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No. 05-

IN THE

Supreme Court of the United States

THOMAS POOLE, Superintendent
FIVE POINTS CORRECTIONAL FACILITY and
ELIOT L. SPITZER, Attorney General of New York,

Petitioners,

v.

DWAYNE HENRY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does this Court's decision in Williams v. Taylor logically require that a federal court first determine whether the law applied by the state courts is contrary to Supreme Court precedent before determining whether it is a misapplication of it, and, if so, is New York's ineffective-assistance-of-counsel standard contrary to Strickland?

2. Did the Second Circuit misstate and misapply the Strickland standard by erroneously equating it to a harmless error standard, which placed the burden on the State to disprove prejudice under Strickland's second prong, while Strickland specifically provides that the defendant bears the burden of affirmatively proving prejudice, and was this error compounded by the Second Circuit's failure to accord any deference on habeas review to the New York State Court of Appeals' decision rejecting defendant's ineffective-assistance-of-counsel claim?

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The order of the Court of Appeals for the Second Circuit denying the petition for panel rehearing and rehearing *en banc* is not reported. It is reprinted in the appendix of this petition at pp. 47a.

The opinion of the Court of Appeals for the Second Circuit is published at 409 F.3d 48 (2d Cir. 2005). It is reprinted in the appendix of this petition at pp. 5a-46a.

The decision of the New York State Court of Appeals is published at 95 N.Y.2d 563 (2000). It is reprinted in the appendix of this petition at pp. 1a-4a.

JURISDICTION

This petition for a writ of *habeas corpus* was filed in the Eastern District of New York invoking federal jurisdiction under 28 U.S.C. § 2254. On October 8, 2003, Eastern District Judge Jack Weinstein denied the petition, holding that defendant had failed to demonstrate that the state courts' denial of his claim was contrary to, or an unreasonable application of, Strickland v. Washington, 466 U.S. 668 (1984).

On May 24, 2005, the Second Circuit entered an order reversing the judgment of the district court and remanding the case for retrial.

On June 23, 2005, the State's filed a timely motion seeking rehearing and rehearing en banc, pursuant to FRAP Rule 35.

In an order dated October 21, 2005, and entered October 25, 2005, the Second Circuit denied the petition for rehearing and rehearing en banc.

This petition for certiorari is filed within ninety days of the Second Circuit's order denying rehearing, and is therefore timely. Sup. Ct. R. 13.3. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 2254(d) of [Chapter] 28 of the United States Code provides:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States[.]

STATEMENT OF THE CASE

On August 10, 1995, just after midnight, defendant and four unapprehended accomplices robbed Mr. Richard Mitchell, a livery cab driver, at gunpoint, stealing his cab and approximately $130 in cash. Mitchell provided the police with a detailed description of defendant, and subsequently identified defendant in a lineup. Thereafter, defendant was arrested and

charged with Robbery in the First Degree (Penal Law § 160.15[4]) and Robbery in the Second Degree (Penal Law § 160.10[1]) (Queens County Indictment Number 4062/95).

State Court Proceedings

Defendant proceeded to a jury trial, at which he presented both a misidentification defense and an alibi defense. With respect to the latter, defendant's girlfriend, Lakesha Person, testified, as she had in the Grand Jury, that she had been with defendant on the night of August 10, 1995. However, at trial, the prosecutor exposed this testimony as "irrelevant," as it related to the night after the crime. Defendant was ultimately convicted of the charged crimes and sentenced to an aggregate prison term of from ten to twenty years.

On his direct appeal in state court, defendant argued that he was denied the effective assistance of counsel by his attorney's error in presenting a witness who provided an "alibi" for the wrong date. The Appellate Division reversed defendant's judgment of conviction, deeming the error ineffective per se, as it "went to the heart of the alibi." People v. Henry, 266 A.D.2d 564 (2d Dept. 1999).

The State was subsequently granted leave to appeal to the New York State Court of Appeals. People v. Henry, 2000 N.Y. LEXIS 1357 (March 22, 2000). In a unanimous decision dated December 21, 2000, the New York Court of Appeals reversed the order of the Appellate Division, reiterating that New York's standard for gauging ineffective assistance of counsel claims does have a prejudice component, and holding that defendant was not denied the effective assistance of counsel. People v. Henry, 95 N.Y.2d 563 (2000). Specifically, the Court held that "although the prosecution discredited the alibi testimony, this alone did not 'seriously compromise'

defendant's right to a fair trial" because counsel had "competently represented defendant's interests at other stages of the proceedings, and counsel's presentation of the alibi testimony did not diminish the legitimacy of defendant's misidentification defense," which the court characterized as the "the thrust of the defense." Id. at 566. To the contrary, the Court found that other portions of the alibi witness's testimony actually buttressed the misidentification defense. Id. The Court thus concluded that, "in view of the extensive misidentification defense and counsel's competency in all other respects . . . counsel's failed attempt to establish an alibi was at most an unsuccessful tactic that cannot be characterized as ineffective assistance." Id. at 556.

On March 11, 2002, defendant filed a collateral motion to vacate his conviction on the same legal grounds presented in the Court of Appeals, heightened factually by trial counsel's newly-executed affidavit stating that he had made a mistake in presenting the alibi, and did not actually realize that it related to the day after the crime. Defendant argued that this new proof effectively countered the State's argument in the Court of Appeals that counsel's decision to present the alibi testimony may have been an intentional trial gambit.

The State opposed the motion as procedurally barred on the grounds that the legal issue had been raised, and decided, on defendant's direct appeal. The State also argued that the affidavit did not constitute "newly discovered evidence" as it did not constitute evidence that could have been admitted at trial at all. Alternatively, on the merits, the State argued that defendant's claim was meritless, even accepting counsel's affidavit at face value, because his attorney's subjective intent was irrelevant to the determination of whether his decision to present the alibi was "tactical" and, in any event, the Court of

Appeals had properly ruled that counsel's mistake in this regard was non-prejudicial.

On March 26, 2002, the state Supreme Court denied the motion as procedurally barred. Defendant's subsequent motion for leave to appeal was denied.

The Proceedings in Federal Court

On May 16, 2002, defendant, through counsel, filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of New York, reiterating his ineffective-assistance-of-counsel claim. On October 8, 2003, the district court denied the petition, holding that defendant had failed to demonstrate that the state courts' denial of his claim was contrary to, or an unreasonable application of, Strickland. Specifically, the court reasoned that a review of the record revealed that counsel had "zealously, thoroughly and effectively" represented defendant at all stages of the trial and sentencing, and that, given the evidence and the circumstances of the case, there was "no reasonable possibility that absent counsel's decision to elicit the alibi testimony the outcome of defendant's trial would have been different." (A-31). Nevertheless, the district court issued a certificate of appealability.

Defendant subsequently appealed to the United States Court of Appeals for the Second Circuit. In a decision dated May 24, 2005, and reduced to Mandate on October 26, 2005, a panel of that Court reversed the decision of the district court, holding that the New York State Court of Appeals' rejection of defendant's ineffective-assistance-of-counsel claim was an unreasonable application of Strickland under 28 U.S.C. § 2254. In reaching this conclusion, the Second Circuit reasoned that counsel's performance was deficient under Strickland's first

prong and could not be deemed a "tactic" as the State's highest court had concluded, because it is "axiomatic that exculpatory statements, when shown to be false, are circumstantial evidence of guilty consciousness and have independent probative force." Henry v. Poole, __ F.3d __, 2005 U.S. App. Lexis 9447, *28-29 (2d Cir. May 24, 2005). The Second Circuit also deemed the New York Court of Appeals "objectively unreasonable" in failing to consider the affirmatively harmful effect of a false alibi, and deemed Strickland's second prong satisfied, holding that, "we cannot conclude that there is no reasonable probability that the presentation of the false alibi defense affected the outcome of Henry's trial." Henry, supra, at *29. Additionally, in a lengthy discussion spanning approximately six pages, the Second Circuit clearly expressed its view that New York's standard for gauging ineffective assistance of counsel claims, is, in fact, contrary to the Strickland standard. And while the Second Circuit noted that it was bound to follow its own precedent to the contrary (Lindstadt v. Keane, 239 F.3d 191 (2d Cir. 2001); Loliscio v. Goord, 263 F.3d 178 (2d Cir. 2001), its discussion certainly cast doubt on the continued vitality of those cases, and, a fortiori, on the New York standard.

On June 23, 2005, the State's filed a motion seeking rehearing and rehearing en banc, pursuant to FRAP Rule 35, on the grounds that the panel's decision conflicted both with the decisions of this Court in Strickland v. Washington, 466 U.S. 668 (1984) and Williams v. Taylor, 529 U.S. 362 (2000), and with the decisions of the Second Circuit in Lindstadt v. Keane, 239 F.3d at 198 and Loliscio v. Goord, 263 F.3d at 193.

In an order dated October 21, 2005, and entered October 25, 2005, the Second Circuit denied the petition for rehearing and rehearing en banc.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted because the Second Circuit's decision conflicts with this Court's decision in Strickland v. Washington, 466 U.S. at 668, as it misapplies the Strickland standard by erroneously placing the burden on the State to disprove prejudice under Strickland's second prong, while Strickland specifically provides that the defendant bears the burden of affirmatively proving prejudice. Additionally, the Second Circuit's decision, to the extent that it reasons that New York's test for ineffective assistance of counsel is contrary to Strickland, also directly conflicts with at least three other decisions of that Court (see Lindstadt v. Keane, 239 F.3d at 191; Loliscio v. Goord, 263 F.3d at 191; and Eze v. Senkowski, 321 F.3d 110, 123-24 [2003]), and literally hundreds of district court decisions. And the Second Circuit's decision in this matter has far-reaching significance, for the claim of ineffective assistance of counsel is one of the most commonly asserted challenges to a judgment of conviction, both in state court, and on habeas corpus review. Accordingly, review by this Court is appropriate and, indeed, essential, to resolve these exceedingly important issues.

I. This Court Should Grant Certiorari to Determine Whether New York's Standard for Gauging Ineffective-Assistance-of-Counsel Claims is Contrary to Strickland v. Washington.

Pursuant to 28 U.S.C. § 2254(d), "an application for a writ of habeas corpus . . . shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." In Williams v.

Taylor, 529 U.S. 362 (2000), this Court delineated an analytical framework for this deferential standard of review, identifying the need to treat independently the "contrary to," and the "unreasonable application of," clauses of section 2254(d)(1). And while the Court did not specifically state that the former inquiry must precede the latter, logic dictates that this is so; for how can a State court be deemed to have reasonably or unreasonably applied a standard that it did not follow at all?

Nevertheless, in this case, while the Second Circuit expressed its view, in dicta, that New York's standard for gauging ineffective-assistance of counsel claims was contrary to Strickland -- in opposition to three prior Second Circuit decisions[1] and hundreds of district court decisions -- it ultimately based its decision on the "unreasonable application" prong of section 2254(d).

This raises two important issues for this Court's review. First, this Court should grant certiorari to clarify that a federal court's analysis under 2254(d) should first consider whether the standard applied by the state court is contrary to Supreme Court precedent, and then, if it is not deemed contrary, whether the state court unreasonably applied this Court's precedent. Second, this Court should grant certiorari to determine whether New York's standard for gauging ineffective assistance of counsel claims is, in fact, contrary to Strickland.

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[1] See Lindstadt v. Keane, 239 F.3d 191 (2d Cir. 2001) (state court's use of the Baldi standard did not render an ineffective-counsel determination "contrary to" clearly established federal law, namely Strickland v. Washington, for habeas purposes); Eze v. Senkowski, 321 F.3d 110 (2d Cir. 2003) (same); Loliscio v. Goord, 263 F.3d 178, 191 (2d Cir. 2001) (same).

With respect to this latter issue, the Second Circuit is now clearly divided on this point; yet since its decision in Lindstadt, more than two thousand New York State cases have involved claims of ineffective assistance of counsel.[2] In view of the frequency with which this claim is asserted at both the state level and on habeas review, it is absolutely essential that this Court consider and resolve this exceedingly important issue so as to secure and maintain uniformity in the law and confidence in the continued vitality of the State standard.[3] Therefore, for both of these reasons, this Court should grant the petition for a Writ of Certiorari.

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[2] As revealed by a LEXIS search of New York State cases, restricted by date from January 4, 2000, until June 23, 2005, and using the terms: "ineffective assistance of counsel" or "effective assistance of counsel" or "meaningful representation."

[3] Conversely, if New York's ineffective-assistance-of-counsel standard is, in fact, contrary to Strickland, then it is truly of paramount importance that this issue be addressed by this Court, not just for the sake of clarity and uniformity, but also to protect defendants' constitutional rights. For, each day that this issue is left unresolved, countless habeas petitions asserting ineffective-assistance claims, which are now pending in the district courts, will be decided under the Second Circuit's binding precedent in Lindstadt, and rather than being reviewed de novo, the state courts' denial of these claims will be improperly accorded AEDPA deference.

II. The Second Circuit's Decision Conflicts with Strickland v. Washington by Shifting the Burden to the State to Disprove Prejudice under Strickland's Second Prong; An Error Exacerbated By the Second Circuit's Failure to Accord Deference to the State Court's Decision Holding that Counsel's Error Was Not Prejudicial.

Pursuant to this Court's decision in Strickland v. Washington, in order to succeed on a claim of ineffective assistance of counsel, a defendant must show first, that his attorney's representation fell below an objective standard of reasonableness and, second, that "there *is* a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding *would* have been different." Strickland, 466 U.S. at 694 (emphasis added). Unlike a harmless error analysis, in which the State bears the burden of proving a lack of prejudice, and can only prevail if there is *no* reasonable probability of a different result (see, e.g., Chapman v. California, 366 U.S. 18 [1967]), under Strickland, the defendant bears the burden of affirmatively proving prejudice: of showing that but for the error, the outcome *would* have been different. Strickland, 466 U.S. at 694; see also Williams v. Taylor, 529 U.S. 362, 394 (2000) ("it is insufficient to show only that the errors had some conceivable effect on the outcome of the proceeding, because virtually every act or omission by counsel would meet that test. The defendant bears the highly demanding and heavy burden in establishing actual prejudice").

Here, in concluding that defendant had been deprived of effective assistance of counsel under Strickland, the Second Circuit reasoned that the prejudice prong had been satisfied because "we *cannot* conclude that there is *no* reasonable probability that the presentation of the false alibi defense affected the outcome of Henry's trial." See Henry v. Poole,

F.3d __, 2005 U.S. App. Lexis 9447, *29-30 (2d Cir. May 24, 2005) (emphasis added); see also id. at *33 ("we *cannot* conclude . . . that there is *no* reasonable probability that, but for counsel's professionally deficient representation . . . the result of the trial would have been different"). But in deeming the prejudice prong satisfied because it could *not* conclude that there was *no* reasonable probability of a different result, the Second Circuit shifted the burden of proof on this issue, in effect using a harmless error analysis.[4] See e.g. United States v. Quiroz, 13 F.3d 505, 513-14 (2d Cir. 1993) (using identical language in harmless error test); United States v. Mason, 993 F.2d 406, 409 (4th Cir. 1993) (same); Kampshoff v. Smith, 698 F.2d 581, 588 (2d Cir. 1983) (same).

This Court should grant certiorari to correct the Second Circuit's misstatement of the Strickland standard and to clarify that Strickland's prejudice prong is *not* a harmless error test, and is, moreover, entirely incongruous with such a test. See Lockhart v. Fretwell, 506 U.S. 364, 369 n.2 (1993); United States v. Gordon, 829 F.2d 119, 129 n.10 (D.C. Cir. 1987) ("The Strickland test imposes on the defendant the burden of proving prejudice . . . while the harmless error standard requires the government to show a lack of harm beyond a reasonable doubt"); see also Lawrence v. Armontrout, 961 F.2d 113, 115 (8th Cir. 1992) (reversing district court's decision granting writ

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[4] Under a harmless error analysis, an error requires reversal unless the non-moving party can prove "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." Chapman v. California, 386 U.S. 18, 24 (1967). Because of the wording of the standard, courts finding that the Chapman standard was satisfied usually use double-negative language in their harmless-error analysis, such as, "we cannot conclude that no harm resulted."

of habeas corpus on basis of ineffective assistance of counsel where court "applied an improper harmless error standard" in gauging prejudice under Strickland's second prong, which "improperly shift[ed] the burden of proof from [defendant] to the State"); Tucker v. Kemp, 1985 U.S. App. LEXIS 21204, *2-3 (11th Cir. 1985) (dissent of Clark, Kravitch and Johnson) (reasoning that language identical to that used by the Second Circuit here was "a paraphrase of the harmless error test . . . in Chapman," and is, thus, "incompatible with the Strickland prejudice test"); Brooks v. Kemp, 1985 U.S. App. LEXIS 21202, *2-3 (11th Cir. 1985) (same).

Moreover, this Court's review of this case is warranted because the Second Circuit's misapplication of the prejudice standard in this case -- on two separate occasions -- cannot be deemed inconsequential, or a mere inartful linguistic choice, as it clearly impacted the result of this proceeding, and, more significantly, could do so in countless other cases in view of its precedential force. First, as a matter of pure logic, a holding that "we cannot conclude . . . that there is *no* reasonable probability that . . . the result of the trial would have been different" is simply not equivalent to the requisite finding that "there *is* a reasonable probability that the result of the trial *would* have been different," although removal of the double negative would so suggest. See, generally, United States v. North, 910 F.2d 843, 886 (D.C. Cir. 1990) ("We realize that this last clause ['not unlawful'] is a double negative, but the change in wording makes a real difference"). While under a correct statement of the standard, a mere possibility of prejudice would not suffice to satisfy Strickland's test, under the Second Circuit's statement of the standard, a possibility of prejudice would be sufficient. Stated another way, a declaration that the court cannot conclude that no reasonable probability exists is not the same as declaring that one does exist. Rather, it merely

amounts to a finding that one *might* exist.[5] But this is insufficient to satisfy Strickland's prejudice prong. Cf. Williams v. Taylor, 529 U.S. at 394 (striking down burden-shifting standard that permitted "reasonable possibility" of prejudice, for "it is insufficient to show only that the errors had some conceivable effect on the outcome of the proceeding, because virtually every act or omission by counsel would meet that test. The defendant bears the highly demanding and heavy burden in establishing actual prejudice").

Second, under the specific facts of this case, the Second Circuit would simply not have been able to draw the requisite conclusion: that there *is* a reasonable probability that, absent counsel's error in presenting an alibi for the wrong date, defendant would have been acquitted. Even assuming, without conceding, that counsel had no reasonable tactical justification for attempting to present the wrong-date alibi, and even assuming that the defense was undoubtedly harmed by it,[6] the

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[5] Using a different example of the logical flaw, "I cannot conclude that there is no life on other planets" does not equate to the statement "there is life on other planets," although mere removal of the double negatives so suggests. Rather, the first statement is true in the absence of affirmative proof; while the latter would not be. This is precisely the problem here. Under the Second Circuit's statement of the standard, the prejudice prong would be satisfied in the absence of affirmative proof of impact on the outcome; but Strickland requires such affirmative proof.

[6] As argued in the State's brief, counsel may well have had several tactical reasons for presenting the wrong-date alibi, including defendant's possible insistence that he do so, or a decision to gamble on the possibility that the prosecutor and

jury might not notice the discrepancy -- like two prior judges, a prior defense attorney, a prior prosecutor, and a grand jury had all failed to notice it. While the Second Circuit rejected the first of these proffered reasons as conjecture, being that the "State ha[d] not provided . . . any record excerpt or citation indicating that Watts presented the phony alibi defense at Henry's insistence," (Henry v. Poole, 2005 U.S. App. LEXIS 9447, at *28), this again improperly placed the burden on the State to *prove* a tactical explanation, rather than on defendant to *disprove* it, as Strickland requires. See, e.g., Jermyn v. Horn, 266 F.3d 257 (3d Cir. 2001)(Strickland's presumption of competence means that the absence of a direct explanation in the record for counsel's conduct may be construed against defendant). Likewise, the Second Circuit's rejection of the State's second argument on the grounds that it is "generally acknowledged" that presentation of a "*false* alibi constitutes evidence of the defendant's consciousness of guilt," (Henry, supra, at *28) (emphasis added and internal quotations omitted), is misplaced, for Person's wrong-date alibi testimony was not *false – nor was it exposed as such.* Rather, both the prosecutor and the defense attorney highlighted that her trial testimony was perfectly consistent with her testimony in the Grand Jury, and simply irrelevant to the night of the crime. This error in the Second Circuit's decision is significant, for while *false* alibi testimony, like any other *false* testimony, has a direct bearing on a witness's credibility, irrelevant or mistaken testimony does not have the same devastating effect on the defense; and none of the authority relied upon by the Second Circuit establishes that it does. As this presumption of devastating harm from a *false* alibi forms the crux of the Second Circuit's holding on both performance and prejudice, as well as of its ultimate determination that the State's highest court was objectively unreasonable for failing to appreciate this

harm would simply not rise to the level of creating a reasonable probability of acquittal in view of the strength of the State's case, the inherent unreliability of the defense witness, and the weakness of the misidentification defense.[7] Indeed, to the extent that it prejudiced the defense in any way, the failed alibi could have only diminished -- or even destroyed -- Lakesha Person's credibility. But, as the State court correctly concluded, this could not have impacted the jury's verdict in any way, as Person was completely incredible from the start. Absent from the Second Circuit's discussion on this issue, but clear from the record, is the fact that Person had a significant criminal record, and had used false aliases and false pedigree information upon her arrests (Trial: 291-96). Additionally, Person was defendant's girlfriend, who had been living with him for several years at the time of the trial, and was, thus, as the jury was properly charged, an interested witness.

And, in any event, even assuming that her credibility was otherwise stellar, the misidentification testimony provided by Person was not compelling or significant. As a threshold matter, Person could not have provided an alibi for the correct

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(Id. at *42), the Second Circuit's error in this respect was truly egregious.

[7] The Second Circuit characterizes the State's argument on appeal relating to counsel's competency in presenting a forceful misidentification defense as a concession that the misidentification defense was strong (Henry, supra at *30). This characterization is simply unfair. While there is no doubt that defense counsel did his best to forcefully present the best misidentification defense that he could muster under the circumstances, that defense was hardly persuasive, and certainly did not mandate an acquittal.

date, as she would have been immediately impeached with her Grand Jury testimony, where her alibi testimony, like defendant's, related to the wrong date. Indeed, defendant has never alleged that he actually had any alibi for the night of the crime, so he cannot be deemed to have been prejudiced by being deprived of such a defense. With respect to the remainder of her testimony, Person testified only that defendant did not have a gold tooth, and had a large tattoo on his chest. While at first blush, this seems significant, as the robber was described with a gold tooth, and no tattoo, in reality these details have no probative value. As the State established, and Person herself acknowledged, the "gold tooth" is a piece of jewelry that can be easily removed, and is not a permanent feature. And the tattoo on defendant's chest would not have been visible to the victim during the robbery, as the victim stated that defendant was wearing a T-shirt.[8] Thus, even assuming, as the Second Circuit does, that the failed alibi was not merely deemed irrelevant by the jury, and actually affirmatively harmed the defense, it still, at most, could only impact Lakesha Person's credibility. But

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[8] The Second Circuit deems the tattoo significant based on defense counsel's insistence on summation that the robber was wearing a tank top, over which the tattoo would have been visible (Henry, supra, at 5, 30, 31). This is doubly flawed. First, while one of the numerous police reports initially reported that the robber was wearing a tank top, the victim's trial testimony clarified that the robber was wearing a t-shirt. Second, there was no indication in the police report or in any testimony that the tank top, if such was worn, was too small to cover defendant's chest. A tank top is merely a sleeveless t-shirt. It can have a high or low neckline. Thus, the jury and the State's highest court were free to reject defense counsel's argument on this point, and the Second Circuit was wrong to have credited it.

this would not, and could not, affect the outcome of the trial. Therefore, if the burden is properly placed on the defendant, as it must be under Strickland's prejudice prong, he simply cannot show that there is a reasonable probability that, absent the elicitation of the wrong-date alibi, he would have been acquitted.

Moreover, the Second Circuit's error was compounded here, where, pursuant to the provisions of 28 U.S.C. § 2254, an additional level of deference was due, but not extended, to the New York State Court of Appeals' decision, which specifically held that, under the unique circumstances of this case, defendant had not been prejudiced by the wrong-date alibi defense. In this vein, the Second Circuit deemed insignificant the New York State Court of Appeals' analysis of counsel's performance as a whole. Likewise, the circuit court did not consider the *actual* effect of the failed alibi under the unique circumstances of this case, as did the State Court of Appeals, but, rather, criticized that court for failing to consider the effect that false alibis *generally* have on trials, as explained by various articles and commentaries in Trial Practice guides. These errors in analysis, revealing the Second Circuit's complete failure to accord any deference to the State's highest court, as required by 28 U.S.C. § 2254, was truly egregious standing alone -- and even more so when coupled with the Second Circuit's misstatement and misapplication of the Strickland standard.

Because the Second Circuit's decision thus misapplied the Strickland standard, resulting in a decision in direct conflict with this Court's decisions in both Strickland v. Washington and Williams v. Taylor, the Second Circuit's decision must be corrected, and this Court should, accordingly, grant the petition for a Writ of Certiorari.

CONCLUSION

For the reasons stated above, this Court should grant the petition for a Writ of Certiorari.

Respectfully submitted,

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January 19, 2006

APPENDIX

**The People of the State of New York, Appellant,
v. Dwayne Henry, Respondent.**

No. 158

COURT OF APPEALS OF NEW YORK

November 15, 2000, Argued December 21, 2000, Decided

JUDGES: Chief Judge Kaye and Judges Smith, Levine, Wesley and Rosenblatt concur.

OPINION BY: CIPARICK

At issue on this appeal is whether defendant was denied meaningful representation when his attorney called an alibi witness who failed to account for defendant's whereabouts on the night of the crime. We conclude that, on this record, he was not.

Evidence was adduced at trial that shortly after midnight on August 10, 1995, a livery cab driver pulled in front of a car service stand to pick up a fare. Defendant entered the car through the front while another man entered through the back. As the car pulled away, defendant asked the driver to make a stop. When they reached the stop, defendant pointed a handgun at him and demanded his money. The driver handed defendant $ 130 while the man seated in the back pointed a shotgun at him. After defendant ordered the driver out of the car, three other men jumped into the car and all five sped off with defendant at the wheel. On August 31, 1995, the driver identified defendant in a lineup. Defendant was arrested and charged with robbery in the first degree (Penal Law § 160.15 [4]) and robbery in the second degree (Penal Law § 160.10 [1]).

At trial, defense counsel presented two defenses. Counsel challenged the reliability of the identification and also presented an alibi witness who testified that she was with defendant at midnight on August 10, 1995. On cross-examination, however, the witness acknowledged her Grand Jury testimony that she knew of defendant's whereabouts only during the night of August 10 and early morning hours of August 11. She could not account for defendant's whereabouts in the early morning hours of August 10. On summation, defense counsel attacked the victim's credibility and argued that the victim mistakenly identified his client as the perpetrator. As for the alibi witness's testimony, counsel maintained that the discrepancy was one for the jury to resolve. In response, the prosecutor argued that because the witness provided an alibi for the wrong date, her testimony should be disregarded.

The jury convicted defendant of all charges. The Appellate Division reversed and held that defendant was denied effective assistance of counsel. The Court reasoned that because the failed testimony " 'went to the heart of the alibi, counsel's error undermined the defense' " *(266 AD2d 564, 565* [quoting *People v Cabrera, 234 AD2d 557, 558])*. A Justice of the Appellate Division granted the People leave to appeal to this Court. We now reverse.

In evaluating ineffective assistance of counsel claims, this Court has consistently applied a "flexible" approach *(People v Benevento, 91 NY2d 708, 712)*. "So long as the evidence, the law, and the circumstances of a particular case, viewed in totality and as of the time of the representation, reveal that the attorney provided meaningful representation," a defendant's constitutional right to the effective assistance of counsel will have been met *(People v Baldi, 54 NY2d 137, 147)*. Thus, the standard in New York has long been whether the defendant was afforded "meaningful representation" *(see, People v Benevento, supra, 91 NY2d, at 712; People v Flores, 84 NY2d 184, 187;*

People v Claudio, 83 NY2d 76, 79-80, rearg dismissed 88 NY2d 1007).

In applying this standard, courts should not confuse true ineffectiveness with losing trial tactics or unsuccessful attempts to advance the best possible defense. The Constitution guarantees a defendant a fair trial, not a perfect one (*Delaware v Van Arsdall, 475 US 673, 681).* Isolated errors in counsel's representation generally will not rise to the level of ineffectiveness, unless the error is "so serious that defendant did not receive a 'fair trial' " (*People v Flores, supra, 84 NY2d, at 188-189).*

Despite our well-settled test for evaluating ineffective assistance of counsel claims, the People ask this Court to adopt the Federal standard, maintaining that it is more precise than the State's "meaningful representation" standard.[9] This Court has previously recognized the differences between the Federal and State tests for ineffectiveness, and has consistently adhered to the application of our "meaningful representation" test (*see, People v Benevento, supra, 91 NY2d, at 713-714; People v Claudio, supra, 83 NY2d, at 79-80).* In doing so, we have clarified "meaningful representation" to include a prejudice component which focuses on the "fairness of the process as a

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[9]The Federal test for evaluating ineffective assistance of counsel claims is set forth in *Strickland v Washington (466 US 668).* To overcome the presumption of effective representation, a defendant must demonstrate that (1) the attorney's performance was deficient, and (2) but for counsel's unprofessional errors, there is a "reasonable probability" that the outcome of the proceedings would have been different (*id., at 687, 694).* The United States Supreme Court has held that the "touchstone" of the second prong of the analysis is whether counsel's performance rendered the proceeding fundamentally unfair or left an unreliable result (*see, Lockhart v Fretwell, 506 US 364, 369-370).*

whole rather than [any] particular impact on the outcome of the case" (*People v Benevento, supra, 91 NY2d, at 714*). No further clarification of the standard is required.

Applying that standard here, we conclude that defendant received meaningful representation. Although the prosecution discredited the alibi testimony, this alone did not "seriously compromise" defendant's right to a fair trial (*see, People v Hobot, 84 NY2d 1021, 1022*). Counsel competently represented defendant's interests at other stages of the proceedings, and counsel's presentation of the alibi testimony did not diminish the legitimacy of defendant's misidentification defense. Indeed, the thrust of the defense was misidentification, which was, in part, buttressed by the alibi witness's testimony. Counsel further supported that defense by vigorously attacking the reliability of the victim's identification and highlighting the discrepancies in the victim's description of defendant. In view of the extensive misidentification defense and counsel's competency in all other respects, we conclude that counsel's failed attempt to establish an alibi was at most an unsuccessful tactic that cannot be characterized as ineffective assistance (*see, People v Jackson, 52 NY2d 1027, 1029*). **[*567]**

Accordingly, the order of the Appellate Division should be reversed, and the case remitted to the Appellate Division for consideration of the facts and issues raised but not determined on appeal to that Court.

Chief Judge Kaye and Judges Smith, Levine, Wesley and Rosenblatt concur.

Order reversed and case remitted to the Appellate Division, Second Department, for consideration of the facts (*CPL 470.25* [2] [d]; 470.40 [2] [b]) and issues raised but not determined on the appeal to that Court.

DWAYNE HENRY, Petitioner-Appellant,
v. THOMAS POOLE, Superintendent
Five Points Correctional Facility and
ELIOT L. SPITZER,
Attorney General of New York,
Respondents-Appellees.

Docket No. 03-2884

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

February 17, 2005, Argued
May 24, 2005, Decided

JUDGES: Before: OAKES, KEARSE, and SACK, Circuit Judges. Judge Sack concurs, in a separate opinion.

OPINIONBY: KEARSE

Petitioner Dwayne Henry, a New York State ("State") prisoner convicted of robbery, appeals from a judgment of the United States District Court for the Eastern District of New York, Jack B. Weinstein, Judge, denying his petition for a writ of habeas corpus pursuant to *28 U.S.C. § 2254* alleging that he received ineffective assistance of counsel when his trial attorney elicited and emphasized an alibi that was clearly given for the wrong day. The district court denied the petition on the ground that the state court's rejection of Henry's ineffective-assistance-of-counsel claim was neither contrary to nor an unreasonable application of clearly established federal law, as determined by the United States Supreme Court, see *28 U.S.C. § 2254(d)(1)*. On appeal, Henry contends that the state court's rejection of his claim constituted an unreasonable application of *Strickland v.*

Washington, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984) ("Strickland"). For the reasons that follow, we agree and reverse the judgment; we instruct that a new judgment be entered, ordering that Henry be released unless the State affords him a new trial within 90 days.

I. BACKGROUND

The present case arises out of the armed robbery of Richard Mitchell, a livery cab driver in Jamaica, Queens, in the early-morning hours of Thursday, August 10, 1995. The only evidence connecting Henry to the crime was his identification by Mitchell.

As testified to at trial, Mitchell complained to the police that, at 12:10 a.m. on August 10, five men robbed him at gunpoint, stealing $ 130 and his cab. Two of the robbers had been passengers in the cab, one of whom sat in front (the other three robbers approached the cab when it arrived at the requested destination). At trial, Mitchell described the front-seat passenger as a dark-skinned black man, 20-22 years old, 5'9" tall, 160-165 pounds, with a gold tooth, and wearing a striped shirt.

Some three weeks after the robbery of Mitchell, Henry, a black teenager, was arrested in an unrelated case and was placed in a lineup that was viewed by Mitchell. Mitchell selected Henry as the robber who had been the front-seat passenger, and Henry was charged with one count each of first-degree and second-degree robbery.

A. Henry's Defense at Trial

Henry's position at trial, as stated by his attorney Patrick Watts in his opening statement to the jury, was that Mitchell was mistaken in his identification of Henry. Watts told the jury that he would call as a witness Lakesha Person, Henry's girlfriend, who would give Henry an alibi for the time [**4] of

the robbery, and that the case would turn on the jury's assessments of the credibility of Mitchell and Person.

Watts cross-examined Mitchell thoroughly in an effort to show that his identification of Henry was mistaken, bringing out discrepancies between Mitchell's initial description of the front-seat robber to the police and Henry's actual appearance. Watts introduced the police complaint report reflecting the initial description that Mitchell had given just 20 minutes after the robbery occurred. Although it appears that Mitchell, some two days after the robbery, gave the police a description of the front-seat robber that more closely matched the description he gave at trial, the description given by Mitchell immediately after the robbery was that the front-seat robber was 20 years old, 5'5" tall, and weighed 120 pounds; he had short hair and was wearing a white T-shirt or tank top.

Watts thereafter cross-examined Police Detective Peter Primerano, who arrested Henry on an unrelated matter on August 31, three weeks after the robbery of Mitchell. Primerano had taken Henry's pedigree information: Henry was 18 years old, was 5'9" tall, and weighed 160 pounds. There is no dispute that, when arrested, Henry had no gold tooth; and the photograph taken of him at that time showed him with a full head of hair. Further, according to the police complaint report, Mitchell initially told the police that the front-seat robber was wearing a T-shirt or tank top; Henry, however, had a large tattoo on his chest that Watts argued would have been visible above a tank top, and Mitchell had made no mention of a tattoo.

Before the arrest of Henry, Primerano had not been assigned to the Mitchell robbery case. After arresting Henry, Primerano called Mitchell to view Henry in a lineup, and Mitchell identified Henry as the front-seat robber. Watts introduced a photograph of the lineup to show that Henry was taller than any of the other participants, arguing that the lineup was suggestive.

Primerano testified that he did no follow-up investigation in connection with the robbery of Mitchell. He "drew up the case with the Queens District Attorney's office," and "that was about it." (Tr. 274.)

Although Watts challenged Mitchell's identification of Henry in many respects, there was no question as to the date and time of the robbery of which Henry was accused--August 10 at 12:10 a.m. Mitchell so testified; the police complaint report introduced by Henry so indicated; and the State's bill of particulars, served on Henry in response to his pretrial discovery request, so stated. Nonetheless, when Watts called Person as a witness, instead of asking her about the early morning hours of Thursday, August 10, he asked her only about events on "th[e] night" of August 10:

> Q. . . . . On August the 10th 1995, was [Henry] your boyfriend?
>
> A. Yes.
>
> Q. And where was Mr. Henry living at that time?
>
> A. With me : . . .
>
> . . . .
>
> Q. Now, Miss Person, directing your attention . . . to August the 10th, 1995, tell the jurors in your own words, just tell them where you and Mr. Henry were on that date and at approximately around twelve o'clock that night.
>
> A. Well, the day started off as usually, get up in the morning, and then early afternoon, like morning to afternoon time, we went to the park with my daughter, me him and my little daughter. And we stayed there for awhile until like it started getting dark like toward the evening time, because

the sun was just going down and it was turning like mid-evening time. Then we went home.

We stayed home for a little while. We were outside for a little while. Then we were supposed to go to the movies, but we wasn't able to go. My mother, she didn't want to watch my daughter for me, so I didn't have no babysitter, so we just stayed in the house that night.

Q. Did Dwayne ever leave your sight that night?

A. No, he did not. We stayed in.

(Trial Transcript ("Tr.") 283-84 (emphases added).)

Q. . . . Why do you remember August the 10th?

A. Because that was the opening date of the movie ["Virtuosity"] that we were supposed to go see and I just calculated back to what we did and everything, and that's how I came to that conclusion that we was, we went to the park and we were supposed to go to the movies that day.

(Id. at 286.) Person also testified that Henry had a prominent tattoo on his chest and that in the four years she had known him, she had never seen him with a gold tooth (see Tr. 285-86), even one that was removable jewelry (see Tr. 305-07).

The Assistant District Attorney ("ADA"), cross-examining Person, sought--and received--confirmation that Person was giving Henry an alibi only for the afternoon and night of August 10 rather than for the early morning hours:

Q. You're testifying that you were with the defendant on Thursday, August 10th, that's your testimony; right?

A. Yes.

Q. And you're testifying that Thursday, August 10th, that morning or that day you went to the park with the defendant, right?

A. Yes.

Q. And then you're testifying that that night you slept with the defendant and he never left your sight, right?

A. Yes.

Q. So that would be Thursday going into Friday, right?

A. Yes.

Q. Okay. And that was, you testified in the grand jury as well, as you spoke about with Mr. Watts, right?

A. Yes.

Q. And when you testified in the grand jury, you also were speaking about Thursday night into Friday that you were with the defendant, right?

A. Um-hm.

Q. Okay. . . . Were you certain of the date when you went into the grand jury?

A. Yes, I was certain.

(Tr. 287-88 (emphases added).)

Q. And you're certain that Virtuosity came out that date. That's your testimony; right?

A. Yeah.

. . . .

Q. And last question, Miss Person, Thursday night, August 10th, you were with the defendant and you slept in the same place with the defendant, never lost sight of the defendant until the next morning; right?

A. Yes.

(Tr. 305, 308 (emphases added).)

Watts had been given a copy of Person's grand jury testimony, in which the alibi period to which she testified was Thursday night into Friday morning, prior to making his opening statement at trial. On redirect examination, Watts had Person confirm that she had told the grand jury that Henry was with her on August 10 and had her reiterate that he was with her on that date; and he again made no effort to ask Person whether Henry was with her in the early morning hours of that date. (See Tr. 308-11.) On recross-examination, the ADA again elicited that Person, testifying before the grand jury, had given Henry an "alibi" for the same time period to which she was referring at trial, i.e., for the night, not the early-morning hours, of August 10:

Q. And you testified for the defendant as an alibi witness similarly to what you are doing now; right?

A. Yes.

Q. And isn't it a fact that similarly to now you testified in the Grand Jury that you were with the defendant during the day on Thursday into Friday, right?

A. Yes.

Q. So that show that you were going to see would have taken you into Friday morning?

A. Yes.

(Tr. 311 (emphases added).)

In the defense summation, Watts began his discussion of the case by reminding the jury of his opening statement that the jury would have to determine whether to believe the identification testimony of Mitchell or the alibi testimony of Person. (See Tr. 315-16.) Watts then summarized his cross-examination of Mitchell, principally as to Mitchell's opportunity and ability to observe the robbers, his memory of the front-seat robber's appearance, including the gold tooth, and Mitchell's failure to mention a tattoo. (See, e.g., Tr. 319-24, 329-30.) Watts reminded the jury of the initial description Mitchell had given the police just 20 minutes after the robbery, a description that Henry did not match in, inter alia, height, weight, age, or hair length. (See, e.g., Tr. 319, 328-29, 335-36.)

Watts also repeatedly emphasized the alibi testimony of Person, whom he described as having no motive to lie, and he urged the jury to find on the basis of her testimony that the State had failed to prove its case (see Tr. 322-23, 325-27, 330-32, 334, 339-40), saying, inter alia,

> look at what L[a]kesha Person is saying. Think about it, ladies and gentlemen. I submit to you, if you do, you will come to the only conclusion

possible, and that is that the People have failed to prove my client's guilt beyond a reasonable doubt.

(Tr. 334.)

But Watts acknowledged that the robbery had occurred just after midnight, on "Wednesday going into Thursday" (Tr. 326), and that Person had testified only with respect to "Thursday . . . until Friday" (id.); and he argued that "she didn't make any mistake about" the date to which she testified (Tr. 339).

You heard from Lakesha Person. She didn't have to lie. What motive does she have to come up here and say to you, ladies and gentlemen, yes, he was with me. And what did she tell us? She said that he was with me. We were at the movies. . . .

. . . . She certainly had a reason to remember August the 10th, 1995. . . .

And what did she say? She said August the 10th, it was a Thursday. I don't know what the assistant district attorney would tell you, but you know what Miss Lakesha said. She said yes, it was Thursday and I stayed with him until Friday, and he left Friday morning. . . .

Now, this crime occurred at twelve o'clock, twelve o'clock August the 10th, 1995. Twelve o'clock, August the 10th, 1995 is when it occurred. Now that's going, Thursday, Wednesday going into Thursday. That's what it is. And that's what the assistant district attorney may say to you. Well, she's alibiing him for the following day, Thursday going into Friday. That's what she's alibiing him for. Not for Wednesday going into Thursday.

Well, she told us, ladies and gentlemen, she sat here and told us at twelve o'clock that night where she was going on August the 10th 1995. Where was she then? She was in her home. She was with Mr. Henry. They were going to the movies, and she even mentioned the movie.

. . . .

. . . . Look at the facts, look at the testimony of both parties. Look at all the evidence, because I know the assistant district attorney may claim well, what Miss Person said, she said it was August the 10th and it was a Thursday to a Friday, and that's how she knows, and because it was Thursday to Friday then, therefore, she was mistaken with regard to the date and time that these individuals went to the movies.

Ladies and gentlemen, she told you what was going on. She told you what was happening on the time in which she went to what they were doing. She told you about the park. She told you about her daughter. She told you about where they went, where they were.

She didn't make any mistake about it. She knew on that day, because like she said, they calculated back what was going on. And is that something wrong with doing that? Something wrong with calculating back to what happened at that particular time? He may tell you well hey, she calculated wrong. And then she's coming in and telling you one thing.

She told you what she told the grand jurors. He was with her. He was there at that time. That's

> what she told us. And that's what it comes down to. Question of belief, ladies and gentlemen.

(Tr. 325-26, 339-40 (emphases added).)

The State in summation of course did not argue that Person had miscalculated or was mistaken as to the date on which she and Henry were together, since her testimony did not refer to the time of the robbery. In addition to arguing that the testimony of Mitchell was credible, the ADA argued that Person had an obvious interest in the exoneration of her boyfriend but had simply given Henry an alibi for the wrong day:

> Now, the defense, of course, calls an alibi witness. And everybody is up on the edge of their seat. This is a big thing. This is where he says he was. Well, very interestingly, this report which the defense put into evidence gives us some very important information.
>
> It says this crime occurred from Wednesday to Thursday, and that is when I directed Mr. Mitchell's attention to. He said he started work Wednesday at six o'clock and this crime occurred in the early evening, Thursday morning. This alibi witness was unequivocal. I wasn't trying to trick her. I asked her specifically, you are testifying that you were with this defendant from Thursday to Friday morning. Ladies and gentlemen, who cares? Is she now, are they now going to say well, they were with each other the night after, so that now counts for Wednesday night into Thursday? That's irrelevant. It means nothing.

(Tr. 349-50 (emphasis added).) The ADA reiterated that Henry "is not charged with committing a crime Thursday into Friday. He is accused with committing a crime Wednesday night into Thursday morning," and that Person "came in and testified about the wrong day." (Tr. 350-51 (emphasis added).)

The ADA argued that Henry and Person had concocted the story that they were at home alone because a story that they were together elsewhere might have been vulnerable to disproof, but that in any event, they concocted the alibi for "the wrong night":

> It is very easy to say, for the alibi witness to come in here and say we were alone. We were just alone that night. . . . Because then there is nobody to corroborate. So she corroborates him and he corroborates her. Nobody else saw them. If they went to the movies, there would be ticket stubs possibly, there would be other people who saw them. It is very easy to say we were supposed to do something, we stayed home. That's why they went with that story. And ladies and gentlemen, it was for the wrong night anyway.

(Tr. 355 (emphases added).) The ADA argued that Mitchell, unlike Person, had no interest in the outcome of the case and no motive to lie about his recognition of Henry, and stated,

> I am going to finish up by just reminding you that the defendant presented a witness who is obviously interested. She gave the wrong alibi date.

(Tr. 364 (emphasis added).)

The jury convicted Henry of first- and second-degree robbery. The court sentenced him to concurrent prison terms of 10-20 and 6-12 years.

B. The State-Court Posttrial Proceedings

Represented by new attorneys, Henry appealed to the Appellate Division, arguing, inter alia, that he had received ineffective assistance of counsel at trial because Watts promised an alibi defense although he knew that the purported alibi witness could not vouch for Henry's whereabouts at the time of the crime, that Watts proceeded to present an alibi defense for the wrong time period, and that he continued to press that defense to the jury even after its flaw was clearly exposed. In *People v. Henry, 266 A.D.2d 564, 699 N.Y.S.2d 129 (2d Dep't 1999)* ("Henry I"), rev'd, *95 N.Y.2d 563, 744 N.E.2d 112, 721 N.Y.S.2d 577 (2000)*, the Appellate Division reversed the convictions, notwithstanding counsel's competence in other aspects of the proceedings, and ordered that Henry be given a new trial.

> Defense counsel's questions to the witness focused on the night of August 10, 1995, resulting in testimony concerning the defendant's whereabouts almost 24 hours after the crime had been committed. Inasmuch as the witness' testimony went to the heart of the alibi, counsel's error undermined the defense, ... [and] the representation provided was not adequate or effective in any meaningful sense of the words.

Henry I, 266 A.D.2d at 565, 699 N.Y.S.2d at 130 (internal quotation marks omitted).

The State sought and received permission to appeal that decision to the New York Court of Appeals ("NY Court of Appeals"), which reversed the decision of the Appellate Division. See *People v. Henry, 95 N.Y.2d 563, 744 N.E.2d 112, 721 N.Y.S.2d 577 (2000)* ("Henry II"). The NY Court of Appeals, applying its established standard for claims of ineffective assistance of counsel--a "flexible" standard under which the state court is to consider whether the defendant received "meaningful representation" based on the "totality" of the circumstances of the case, and whether the defendant has shown "prejudice [based] on the fairness of the process as a whole rather than [any] particular impact on the outcome of the case"--concluded that Henry had not received constitutionally ineffective assistance. *Henry II, 95 N.Y.2d at 565-66, 721 N.Y.S.2d at 578-79* (internal quotation marks omitted). The court stated, in part, as follows:

At trial, defense counsel presented two defenses. Counsel challenged the reliability of the identification and also presented an alibi witness who testified that she was with defendant at midnight on August 10, 1995. On cross-examination, however, the witness acknowledged her Grand Jury testimony that she knew of defendant's whereabouts only during the night of August 10 and early morning hours of August 11. She could not account for defendant's whereabouts in the early morning hours of August 10. On summation, defense counsel attacked the victim's credibility and argued that the victim mistakenly identified his client as the perpetrator. As for the alibi witness's testimony, counsel maintained that the discrepancy was one for the jury to resolve. In response, the prosecutor argued that because the witness provided an alibi for the wrong date, her testimony should be disregarded.

. . . .

In evaluating ineffective assistance of counsel claims, this Court has consistently applied a "flexible" approach (*People v Benevento, 91 N.Y.2d 708, 712, 697 N.E.2d 584, 674 N.Y.S.2d 629*). "So long as the evidence, the law, and the circumstances of a particular case, viewed in totality and as of the time of the representation, reveal that the attorney provided meaningful representation," a defendant's constitutional right to the effective assistance of counsel will have been met (*People v. Baldi, 54 NY2d 137, 147, 429 N.E.2d 400, 444 N.Y.S.2d 893*). Thus, the standard in New York has long been whether the defendant was afforded "meaningful representation" (see, *People v. Benevento, supra, 91 NY2d, at 712; People v. Flores, 84 NY2d 184, 187, 639 N.E.2d 19, 615 N.Y.S.2d 662; People v. Claudio, 83 NY2d 76, 79-80, 629 N.E.2d 384, 607 N.Y.S.2d 912*, rearg dismissed *88 NY2d 1007, 672 N.E.2d 598, 649 N.Y.S.2d 373*).

In applying this standard, courts should not confuse true ineffectiveness with losing trial tactics or unsuccessful attempts to advance the best possible defense. The Constitution guarantees a defendant a fair trial, not a perfect one (*Delaware v Van Arsdall, 475 U.S. 673, 681, 89 L. Ed. 2d 674, 106 S. Ct. 1431*). Isolated errors in counsel's representation generally will not rise to the level of ineffectiveness, unless the error is "so serious that defendant did not receive a 'fair trial'" (*People v Flores, supra, 84 NY2d, at 188-189*).

Henry II, 95 N.Y.2d at 565-66, 721 N.Y.S.2d at 578. The NY Court of Appeals noted that there are differences between its standard of ineffectiveness and the federal standard. It described the federal standard as follows:

The Federal test for evaluating ineffective assistance of counsel claims is set forth in Strickland v Washington (*466 U.S.*

668, 80 L. Ed. 2d 674, 104 S. Ct. 2052). To overcome the presumption of effective representation, a defendant must demonstrate that (1) the attorney's performance was deficient, and (2) but for counsel's unprofessional errors, there is a "reasonable probability" that the outcome of the proceedings would have been different (*id., at 687, 694*). The United States Supreme Court has held that the "touchstone" of the second prong of the analysis is whether counsel's performance rendered the proceeding fundamentally unfair or left an unreliable result (see, *Lockhart v Fretwell, 506 U.S. 364, 369-370, 122 L. Ed. 2d 180, 113 S. Ct. 838*).

Henry II, 95 N.Y.2d at 566 n.*, *721 N.Y.S.2d at 579* n.*. The NY Court of Appeals rejected a request by the State that the federal standard be adopted in lieu of the New York standard:

> Despite our well-settled test for evaluating ineffective assistance of counsel claims, the People ask this Court to adopt the Federal standard, maintaining that it is more precise than the State's "meaningful representation" standard. This Court has previously recognized the differences between the Federal and State tests for ineffectiveness, and has consistently adhered to the application of our "meaningful representation" test. (see, *People v Benevento, supra, 91 NY2d, at 713-714*; *People v Claudio, supra, 83 NY2d, at 79-80*). In doing so, we have clarified "meaningful representation" to include a prejudice component which focuses on the "fairness of the process as a whole rather than [any] particular impact on the outcome of the case" (*People v Benevento, supra, 91 NY2d, at*

714). No further clarification of the standard is required.

Applying that standard here, we conclude that defendant received meaningful representation. Although the prosecution discredited the alibi testimony, this alone did not "seriously compromise" defendant's right to a fair trial (see, *People v Hobot, 84 N.Y.2d 1021, 1022, 646 N.E.2d 1102, 622 N.Y.S.2d 675)*. Counsel competently represented defendant's interests at other stages of the proceedings, and counsel's presentation of the alibi testimony did not diminish the legitimacy of defendant's misidentification defense Indeed, the thrust of the defense was misidentification, which was, in part, buttressed by the alibi witness's testimony. Counsel further supported that defense by vigorously attacking the reliability of the victim's identification and highlighting the discrepancies in the victim's description of defendant. In view of the extensive misidentification defense and counsel's competency in all other respects, we conclude that counsel's failed attempt to establish an alibi was at most an unsuccessful tactic that cannot be characterized as ineffective assistance (see, *People v. Jackson, 52 NY2d 1027, 1029, 420 N.E.2d 97, 438 N.Y.S.2d 299)*.

Henry II, 95 N.Y.2d at 566, 721 N.Y.S.2d at 578-79 (footnote omitted) (emphases added). The NY Court of Appeals accordingly remanded to the Appellate Division for resolution of any remaining issues. On remand, the Appellate Division affirmed Henry's convictions. See *People v. Henry, 281 A.D.2d 490, 721 N.Y.S.2d 793 (2d Dep't 2001)*.

Henry then moved in the state trial court pursuant to *N.Y. Crim. Proc. Law § 440.10(1)(h)* to vacate his convictions on the basis of evidence, beyond the trial record, as to whether trial counsel's introduction of the fallacious alibi evidence was the result of strategy rather than error. Henry submitted an

affidavit from Watts in which Watts denied having intentionally introduced the irrelevant alibi testimony as a "tactic," stating that his use of Person as an alibi witness was simply an honest mistake:

> 5. In the course of appellate litigation in this case, the People have argued that, as a matter of trial strategy, I called or might have called Ms. Person in a deliberate attempt to deceive the jury into adopting an irrelevant alibi, knowing that Ms. Person could not alibi [Henry] for the night of the crime. According to the People this would have been a legitimate trial strategy since, if the discrepancy went unnoticed the jury would adopt the irrelevant alibi and acquit and, if the irrelevance of the alibi was exposed the defense would be no worse off than if it had presented no alibi at all.
>
> 6. In over twenty years of practice as a prosecutor and defense lawyer, I have never employed those or any similar trial tactics. To have called Ms. Person in a deliberate attempt to persuade the jury to adopt an irrelevant alibi would, I believe, have been unethical. In addition, I do not accept that it could ever make strategic sense to jeopardize a strong case by knowingly presenting an irrelevant alibi to a jury.
>
> 7. My reason for calling Ms. Person as an alibi witness in this case was my belief that she knew Mr. Henry's whereabouts at the time of the crime. From her trial testimony it now appears that Ms. Person was confused either about the night on which she and Mr. Henry had planned

> to go to the movies or about the night on which the crime was alleged to have occurred. In either case, it was an honest mistake. If I had believed that Ms. Person was unable to account for Mr. Henry's whereabouts at the time of the crime, I would not have called her as an alibi witness.

(Affidavit of Patrick Watts dated February 11, 2002 ("Watts Aff."), PP 5-7 (emphases added)).

The State opposed the *§ 440.10* motion, contending, inter alia, that it was procedurally barred because the issues raised either were decided on the merits during Henry's direct appeal or were not raised on direct appeal and should have been. The State argued that the Watts Affidavit was irrelevant in part because Henry had argued before the Appellate Division that "the record conclusively demonstrated that 'defense counsel . . . had actual knowledge before trial that defendant's alibi witness could not vouch for appellant's whereabouts at the time of the robbery'" (State's Affirmation in Opposition to Motion To Vacate Judgment at 7 (quoting Henry's brief to the Appellate Division at 22) (emphases in originals)). The State also argued that Watts's affidavit was irrelevant because the NY Court of Appeals had not decided that the fallacious alibi was not the result of attorney error; rather, the State argued, the Court of Appeals had decided simply that counsel's error did not cause Henry prejudice. Finally, the State argued that the motion was meritless because Henry's claim amounted to nothing more than his disagreement with counsel's strategy and that, in any event, that strategy was not harmful.

In a decision dated March 26, 2002, the state trial court agreed with the State's interpretation of the NY Court of Appeals decision and ruled that Henry's ineffective-assistance-of-counsel claim was procedurally barred because "the issue raised herein was previously determined upon the appeal . . . ."

People v. Henry, Ind. No. 4062/95 (Sup. Ct. Queens County, Mar. 26, 2002) ("Henry III"). Leave to appeal that decision to the Appellate Division was denied.

C. The Decision of the District Court in the Present Proceeding

Having exhausted his state-court remedies, Henry filed his present habeas petition, pursuing the ineffective-assistance-of-counsel claim he had asserted in his direct appeals and his *§ 440.10* motion. Henry argued that he had been denied the effective assistance of counsel where his trial lawyer promised an alibi defense, proceeded to elicit an alibi for the night after the crime, and continued to press this fallacious defense on the jury even after the prosecution had exposed its irrelevance, thereby fatally undermining what was otherwise a potentially powerful misidentification defense, and where the prosecution capitalized on these errors by ridiculing counsel's reliance on the fallacious alibi, arguing that the alibi witness had lied to the jury and suggesting that she was so unreliable that she could not even concoct an alibi for the correct night.

(Petitioner's Memorandum of Law in Support of Petition for Habeas Corpus at 9 (emphasis in original)). Henry argued that "defense counsel's reliance on the alibi defense was a colossal blunder, it destroyed an otherwise strong defense, and it is, therefore, overwhelmingly likely that it cost [Henry] a sound chance at acquittal." (Id. at 37.)

The district court denied the petition in a Memorandum, Judgment & Order dated October 8, 2003 ("District Court Opinion" or "Henry IV"). The court observed that since the NY Court of Appeals had rejected Henry's ineffective-assistance-of-counsel claim on its merits, federal habeas corpus relief could not be granted on that claim unless the state court decision was contrary to, or involved an objectively unreasonable application

of, clearly established federal law, as announced by the United States Supreme Court, or was based on an unreasonable determination of the facts in light of the evidence, see *28 U.S.C. § § 2254(d)(1)* and *(2)*. District Court Opinion at 9-10, 25.

Noting that a defendant's *Sixth Amendment* "right to counsel is the right to effective assistance of counsel," District Court Opinion at 18 (internal quotation marks omitted) (emphasis in District Court Opinion), the court described the standard set by the United States Supreme Court in Strickland. It noted the "'strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance,'" id. at 20 (quoting *Strickland, 466 U.S. at 689*), and the general rule that "strategic choices made by counsel after a thorough investigation of facts and law [to the extent reasonably necessary to the defense] are 'virtually unchallengeable,'" District Court Opinion at 20 (quoting *Strickland, 466 U.S. at 690*).

Although the court found that "the prosecutor capitalized on counsel's reliance on this fallacious defense" by, inter alia, "argu[ing] that the alibi was fabricated and suggest[ing] that the fact that Person had testified about the wrong day was evidence of the fabrication," District Court Opinion at 3, the court concluded that the NY Court of Appeals decision in Henry II was not an unreasonable application of the Strickland standard.

> Considering counsel's representation as a whole, the New York Court reasonably concluded that counsel provided petitioner with effective representation. In this regard, the record reveals that counsel zealously and effectively represented petitioner at every stage of the proceedings. Before trial, counsel moved to suppress the victim's identification testimony,

> extensively cross-examined the State's police witness, and argued that the line-up was unduly suggestive . . . . At trial, counsel strenuously objected to the prosecution's . . . applications [to introduce evidence of Henry's prior convictions] . . ., conducted a competent voir dire . . ., and delivered an effective opening statement, in which he raised a strong misidentification defense and emphasized the prosecution's burden of proof . . . . Throughout the course of the trial, counsel raised numerous objections to the prosecutor's questions and arguments, many of which were sustained. He also conducted extensive cross-examination of the State's witnesses, efficiently attacking the victim's credibility by eliciting testimony that he had a suspended license and a misdemeanor conviction . . . .

Counsel presented four exhibits to support his misidentification defense, including the complaint report, which revealed discrepancies between the victim's initial description of petitioner and his actual appearance, and the arrest photograph, which showed that although Mitchell had described petitioner as having short, wavy hair, petitioner had a full head of hair at the time of the arrest . . . . Counsel also republished the lineup photo to the jury, arguing that the lineup was suggestive because petitioner was taller than the five fillers . . . . Counsel presented a defense witness--Lakesha Person, not only to attempt to offer an alibi for petitioner, but also to support the misidentification defense. In this vein, counsel elicited that petitioner had a large tattoo on his chest, which had not been described by the victim . . . . Counsel also elicited that in the four years that she had know[n] petitioner, Person never saw him wear a gold tooth in his mouth--a characteristic that

the victim had mentioned in this description of the robber . . . .

During his summation, counsel presented a cohesive summary of the evidence supporting the misidentification defense. He persuasively argued that Mr. Mitchell's description of the perpetrator did not match petitioner's appearance, and specifically highlighted the differences between Mitchell's description and petitioner's pedigree information . . . . He also referred to Person's testimony that petitioner did not have a gold tooth, and that he had a large tattoo on his chest, arguing that these factors also supported the conclusion that petitioner was not the perpetrator . . . . Counsel emphasized that the eyewitness neighbor who had called the police was never questioned, and did not testify at trial, thus implying that there was a gap in the State's evidence . . . .

Counsel also objected to portions of the court's charge and, after the verdict, argued for a lenient sentence, citing petitioner's youth and family background as mitigating factors . . . . Then, after sentence was imposed, counsel requested that petitioner receive credit for the time he had already served . . . . Thus, viewed in its totality, the record demonstrates that counsel zealously, thoroughly, and effectively represented petitioner throughout the trial.

There is no possibility that, absent counsel's decision to elicit the alibi testimony, the outcome of petitioner's trial would have been different.

District Court Opinion at 28-30. The court denied the petition for habeas but granted Henry a certificate of appealability, finding that he "ha[d] made a substantial showing of the possible denial of a constitutional right." Id. at 30.

II. DISCUSSION

On appeal, Henry contends that the district court should have granted his habeas petition because the state court's holding in Henry II that he had not been denied constitutionally effective assistance of counsel constituted an unreasonable application of the Supreme Court's standard established in Strickland. For the reasons that follow, we agree.

A. The Strickland Standard and the Merits of Henry's Claim

In Strickland, the Supreme Court established a two-pronged test for determining whether a defendant's *Sixth Amendment* right to the effective assistance of counsel had been violated. In order to prove such a violation, a convicted defendant must show both (a) "that counsel's representation fell below an objective standard of reasonableness . . . . under prevailing professional norms," *466 U.S. at 688*, and (b) "that the deficient performance prejudiced the defense," i.e., "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable," *id. at 687*. The Strickland Court elaborated on the contours of each prong.

In considering the quality-of-representation prong, i.e., whether counsel's performance fell below an objective standard of reasonableness, a court must bear in mind both that counsel "has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process," *id. at 688*, and that counsel must have "wide latitude" in making tactical decisions, *id. at 689*. Thus, the court must make "every effort . . . to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time," and "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *466 U.S. at 689*. Actions or omissions by counsel

that "'might be considered sound trial strategy'" do not constitute ineffective assistance. Id. (quoting *Michel v. Louisiana, 350 U.S. 91, 101, 100 L. Ed. 83, 76 S. Ct. 158 (1955)*). "Strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable," *Strickland, 466 U.S. at 690*; and even strategic choices made after less than complete investigation do not amount to ineffective assistance--so long as the known facts made it reasonable to believe that further investigation was unnecessary, *id. at 690-91*.

The "prejudice" prong of the Strickland test requires the court to determine whether, but for counsel's deficient performance, "there is a reasonable probability that . . . the result of the proceeding would have been different," *466 U.S. at 694*, for an "error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment," *id. at 691*. Indeed, the defendant must show more than that the unprofessional performance merely "had some conceivable effect," *id. at 693*. To satisfy the "reasonable probability" test, however, "a defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case," id. (emphases added). The purpose of the *Sixth Amendment* guarantee of "the Assistance of Counsel," *U.S. Const. Amend. VI*, is to ensure that defendants have "'effective'" assistance of counsel, *Strickland, 466 U.S. at 686* (quoting *McMann v. Richardson, 397 U.S. 759, 771 n. 14, 25 L. Ed. 2d 763, 90 S. Ct. 1441 (1970)*, that is, "the assistance necessary to justify reliance on the outcome of the proceeding," *Strickland, 466 U.S. at 691-92* (emphasis added). Thus, "the benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id. at 686*. "The question to be asked in assessing the prejudice from counsel's errors . . . . is whether there is a

reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." *Id. at 695.*

In making this determination, a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury. . . . Some errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture, and some will have had an isolated, trivial effect. Moreover, a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support.

Id. at 695-96 (emphasis added).

In sum, "[a] reasonable probability" that the outcome of the proceeding would have been different but for counsel's professionally unreasonable performance "is a probability sufficient to undermine confidence in the outcome." *Id. at 694.* "The result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome." Id. (emphasis added).

Applying these standards to the present case, we conclude that both prongs of the *Strickland* test are met. The defect in Henry's trial attorney's representation was the elicitation of an alibi for the wrong date--an error that plainly "went to the heart of the alibi," and "undermined the defense," *People v. Long, 81 A.D.2d 521, 521-22, 438 N.Y.S.2d 1, 2 (1st Dep't 1981)* ("The questions of defendant's attorney were keyed to the evening of July 22, thus prompting the alibi witnesses to testify to defendant's whereabouts 24 hours after the [1:40 a.m., July 22] crime." (emphases added)). Further, Watts adhered to the alibi defense and urged the jury to accept it throughout the trial--long after it must have been clear to the jury beyond

peradventure that Person provided Henry with an alibi only for the night after the night of the crime.

Clarity as to the fact that Person could provide Henry with an alibi only for the wrong date is hardly a matter of hindsight. Although Watts stated in his affidavit that in his investigation he had interviewed Person about Henry's whereabouts "on the night of the crime" and had been told that Henry was with her "that night" (Watts Aff. P 2), and stated that "it now appears" that Person was confused (id. P 7 (emphasis added)), Watts could not have made a reasonable investigation because he indisputably possessed all of the pertinent information as to the mismatch of time periods prior to asking Person a single question, and indeed prior to making his opening statement. There plainly was no question as to the date or time of the robbery with which Henry was charged; the indictment, as well as the police complaint report given to Henry in pretrial discovery, specified that the robbery took place on August 10 in the early morning hours. The State also had given Watts Person's grand jury testimony, in which Person had been able to give Henry an alibi only for the night of August 10, i.e., 24 hours after the robbery. Nonetheless, Watts in his opening statement promised to substantiate the defense of misidentification by presenting the testimony of Person, who would provide Henry with an alibi for the time of the crime. Watts then proceeded to question Person only as to "th[e] night" of August 10, not as to the early-morning hours when the crime was committed. The failure to recognize the difference between the beginning and the end of the day plainly falls below any acceptable level of professional competence.

Further, even after the ADA's cross-examination highlighted that Person, in testifying that Henry had been with her on "th[e] night" of August 10, was providing Henry with an alibi only for "Thursday night into Friday," Watts unaccountably persisted with the purported alibi defense. He

acknowledged in his summation that the robbery occurred on "Wednesday going into Thursday" (Tr. 326) and that Person had testified only as to "Thursday going into Friday" (id.); and he said that Person "didn't make any mistake about" the date on which Henry was with her (Tr. 339); she had carefully calculated the precise alibi date by reference to a verifiable external event (see id. at 325). Mystifyingly, Watts told the jury that the ADA would argue that Person was mistaken as to the date on which she and Henry were claimed to have been together. Equally inexplicably, in light of his acknowledgement that the robbery occurred on Wednesday night and that the alibi was for Thursday night, Watts ended his summation by telling the jury that its decision would boil down to whether it believed Person or Mitchell. The failure to recognize that Person's alibi testimony in no way contradicted the testimony of Mitchell--because they dealt with Henry's whereabouts on different nights--is not within the realm of professional competence.

The State contends that Watts's presentation of the false alibi defense should not be considered ineffective assistance because the defense was either forced upon Watts by Henry or was a stratagem employed by Watts in the hope that the mismatch of dates would escape notice by the jury. We reject both hypotheses. The former contention is apparently conjecture, as the State has not provided us with any record excerpt or citation indicating that Watts presented the phony alibi defense at Henry's insistence.

Nor can we accept the State's alternative contention that Watts's presentation of an alibi for the wrong date was simply a tactic, for it is generally acknowledged that an "attempt to create a false alibi" constitutes "'evidence of the defendant's consciousness of guilt.'" *Loliscio v. Goord, 263 F.3d 178, 190 (2d Cir. 2001)* (quoting *People v. Loliscio, 187 A.D.2d 172, 176, 593 N.Y.S.2d 991, 994 (2d Dep't 1993)*); see, e.g., 2 F. Bailey & K. Fishman, Criminal Trial Techniques § 32:21

(2002) ("Maintaining false alibis to meet a false charge is the way many defendants end up in prison. If the prosecution can establish the falsity of an alibi . . ., your case is as good as lost. Many jurors regard a false alibi as an admission of guilt."); 2 G. Schultz, Proving Criminal Defenses P 6.08 (1991) ("There is nothing as dangerous as a poorly investigated alibi. An attorney who is not thoroughly prepared does a disservice to his client and runs the risk of having his client convicted even where the prosecution's case is weak. A poorly prepared alibi is worse than no alibi at all."); see generally *United States v. Parness, 503 F.2d 430, 438 (2d Cir. 1974)* ("It is axiomatic that exculpatory statements, when shown to be false, are circumstantial evidence of guilty consciousness and have independent probative force."), cert. denied, *419 U.S. 1105, 42 L. Ed. 2d 801, 95 S. Ct. 775 (1975).*

In sum, we recognize that counsel has wide leeway to adopt tactical positions; but counsel's lack of recognition that Person presented an alibi for the wrong night, and his presentation, adherence to, and emphasis on that evidence although it had no tendency to show Henry's innocence and was instead a type of evidence that is commonly accepted as evidence of a defendant's consciousness of guilt, was representation that fell far below an objectively acceptable level of professional competence.

As to the prejudice prong of *Strickland*, we cannot conclude that there is no reasonable probability that the presentation of the false alibi defense affected the outcome of Henry's trial. There was no evidence that Henry had been targeted as a suspect in the robbery of Mitchell as a result of investigative police work--either before or after Mitchell picked him out of a lineup. Although on the night of the robbery, the police and Mitchell drove around the neighborhood looking for the robbers, they had no success. The evidence at trial was simply that Henry was arrested three weeks later on an

unrelated charge by a detective not assigned to the Mitchell robbery case; Henry was identified by Mitchell from a lineup that Watts was able to argue was suggestive because the lineup photograph showed that Henry was taller than the other participants; and Primerano, the arresting detective, testified that after Mitchell picked Henry out of that lineup, Primerano simply "drew up the case" with the District Attorney's office, and "that was about it" (Tr. 274).

Thus, the only evidence presented to the jury to connect Henry to the robbery of Mitchell was Mitchell's identification testimony. And as the State argues on this appeal, Henry had a "strong" defense of misidentification. (State brief on appeal at 21.) Watts's presentation of photographic and documentary evidence and his cross-examinations of Mitchell and Primerano in an attempt to show that Mitchell's identification of Henry was mistaken, were efforts well spent, as he showed that "there were numerous discrepancies between the victim's initial description of [the front-seat robber] and [Henry's] actual appearance" (State brief on appeal at 44). Mitchell had observed the front-seat robber at close range for some 10 minutes during the robbery and had given the police a description a mere 20 minutes thereafter. As shown by the police complaint report, Mitchell's initial description was that the front-seat robber was some 20 years of age, was 5'5" tall, weighed 120 pounds, and had short hair; Henry, however, was 18 years old, 5'9" tall, weighed 160 pounds, and had a full head of hair. In addition, Mitchell told the police that that robber had a gold tooth; Henry, when arrested, had no such tooth, and Person testified that in the four years she had known Henry, living with him for two, he had never had a gold tooth. Thus, Watts brought out that, in contrast to the description Mitchell had given the police immediately after the robbery, Henry was the wrong age, the wrong height, the wrong weight, had the wrong hair style, and had no gold tooth. Small wonder, then, that on this appeal the

State describes Watts's presentation of the misidentification defense as "cogent," "persuasive[]," and "convincing[]" (State brief on appeal at 48, 22, 13).

The State's weakened case was bolstered, however, by the false alibi evidence. Although the State argues on this appeal that the false alibi evidence was simply inconsequential and had no more effect than if no alibi had been offered, the record does not support that characterization. According to the ADA on summation, Watts's promise of an alibi defense was "a big thing" that had had "everybody . . . up on the edge of their seat." (Tr. 349.) The ADA proceeded to hammer home the fact that Person gave Henry an alibi only for the wrong time period. (See Tr. 350 ("wrong day"), id. at 354 ("wrong day"), id. at 355 ("wrong night"), id. at 364 ("I'm going to finish up by just reminding you that the defendant presented a witness who is obviously interested. She gave the wrong alibi date.".)

Moreover, as the district court noted, the ADA was able to "capitalize[] on counsel's reliance on th[e] fallacious [alibi] defense" by "argu[ing] that the alibi was fabricated and suggest[ing] that the fact that Person had testified about the wrong day was evidence of the fabrication." Henry IV at 3. Thus, the ADA argued to the jury that the entire attempt at an alibi defense was a "story" that had been carefully contrived to avoid amenability to extrinsic corroboration or contradiction. He argued that "the alibi witness . . . come[s] in here and say[s] we were alone . . . . because then there is nobody to corroborate. . . . If they went to the movies, there would be ticket stubs possibly, there would be other people who saw them. It is very easy to say we were supposed to do something, we stayed home. That's why they went with that story." (Tr. 355 (emphasis added).

In sum, "consider[ing] the totality of the evidence before the . . . jury," *Strickland, 466 U.S. at 695*, and bearing in mind

that "a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support," *id. at 696*, we lack confidence that the result of Henry's trial was reliable, given the lack of any evidence to connect Henry to the crime other than his selection from an arguably suggestive lineup, and the subsequent identification at trial, by a victim whose initial description of the robber differed from Henry as to, inter alia, age, height, weight, and hair length. We cannot conclude, given the persuasive misidentification defense, that there is no reasonable probability that, but for counsel's professionally deficient representation in devoting a significant portion of the defense to the presentation of false alibi evidence that was irrelevant to show Henry's innocence and instead suggested his consciousness of guilt, the result of the trial would have been different. We conclude that Henry's *Sixth Amendment* right to the effective assistance of counsel at trial was violated.

This conclusion does not end our inquiry, however, for a state prisoner seeking a federal writ of habeas corpus on the ground that he was denied effective assistance of counsel must show more than simply that he meets the Strickland standard. Under *28 U.S.C. § 2254* as amended by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), the state court's decision rejecting his claim is to be reviewed under a more deferential standard than simply whether that decision was correct.

B. The AEDPA Standards

When, as here, the state court has rejected the petitioner's claim on the merits, a federal court considering a habeas corpus petition under *28 U.S.C. § 2254*, as amended by AEDPA, must defer to the state court's rejection of the claim, and must deny the writ unless (to the extent pertinent here) the state-court adjudication (1) "was contrary to," or (2) "involved

an unreasonable application of," clearly established federal law "as determined by the Supreme Court of the United States," *28 U.S.C. § 2254(d)(1)*; see *Williams v. Taylor, 529 U.S. 362, 412-13, 146 L. Ed. 2d 389, 120 S. Ct. 1495 (2000)*. Thus, a petitioner whose claim is that he received ineffective assistance of counsel not only must satisfy the Strickland standard but also must show that the state court's rejection of his claim either was either contrary to Strickland or was an unreasonable application of Strickland, see, e.g., *Williams, 529 U.S. at 412-13*; *Bell v. Cone, 535 U.S. 685, 699, 152 L. Ed. 2d 914, 122 S. Ct. 1843 (2002)*; *Eze v. Senkowski, 321 F.3d 110, 122 (2d Cir. 2003)* ("Eze"); *Loliscio v. Goord, 263 F.3d at 184, 192-93*; *Lindstadt v. Keane, 239 F.3d 191, 198 (2d Cir. 2001)* ("Lindstadt").

A state-court decision is "contrary" to clearly established federal law within the meaning of *§ 2254(d)(1)* if it is "diametrically different" from, "opposite in character or nature" to, or "mutually opposed" to the relevant Supreme Court precedent. *Williams, 529 U.S. at 405* (internal quotation marks omitted). Thus, a federal court may grant habeas under the "contrary to" clause "if the state court arrive[d] at a conclusion opposite to that reached by th[e Supreme] Court on a question of law or if the state court decide[d] a case differently than th[e] Court has on a set of materially indistinguishable facts." *Williams, 529 U.S. at 413*.

The "unreasonable application" standard is independent of the "contrary to" standard; and it is less clearly defined. The Williams Court made clear, however, that although "'unreasonable' is no doubt difficult to define," *id. at 410*, the term "unreasonable application" of federal law means more than simply an "erroneous" or "incorrect" application, *id. at 411*; see, e.g., *Bell v. Cone, 535 U.S. at 694*. "[A] federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or

incorrectly. Rather, that application must also be unreasonable." *Williams, 529 U.S. at 411.*

On the other hand, Williams also made clear that a federal habeas court may permissibly conclude that federal law has been unreasonably applied by the state court even though not all reasonable jurists would agree that the state court's application was unreasonable. See *529 U.S. at 409* (appellate court's ruling that a state-court decision can constitute an "unreasonable application . . . only if the state court has applied federal law in a manner that reasonable jurists would all agree is unreasonable" was "erroneous" (internal quotation marks omitted)). Rather, "a federal habeas court making the 'unreasonable application' inquiry should ask whether the state court's application of clearly established federal law was objectively unreasonable." *Id. at 409* (emphasis added). The Williams Court concluded that "under the 'unreasonable application' clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id. at 413.*

In light of the Williams discussion, this Court has concluded that an "objectively unreasonable" application of Supreme Court precedent falls somewhere between "merely erroneous and unreasonable to all reasonable jurists." *Francis S. v. Stone, 221 F.3d 100, 109 (2d Cir. 2000).* "Some increment of incorrectness beyond error is required," but that "increment need not be great." *Id. at 111.*

C. Application of the AEDPA Standards to Henry II

As discussed in Part I.B. above, the NY Court of Appeals in Henry II rejected Henry's ineffective-assistance-of-counsel claim, using its "flexible approach," *95 N.Y.2d at 565, 721 N.Y.S.2d at 578* (internal quotation marks omitted), which had been enunciated in *People v. Baldi, 54 N.Y.2d 137, 147,*

429 N.E.2d 400, 444 N.Y.S.2d 893, 898 (1981) ("Baldi"), prior to the Supreme Court's 1984 decision in Strickland. Under that approach

> "so long as the evidence, the law, and the circumstances of a particular case, viewed in totality and as of the time of the representation, reveal that the attorney provided meaningful representation, the constitutional requirement will have been met" (*People v Baldi, 54 NY2d, at 147*). The core of the inquiry is whether defendant received "meaningful representation."

People v. Benevento, 91 N.Y.2d 708, 712, 697 N.E.2d 584, 674 N.Y.S.2d 629, 632 (1998) ("Benevento"). The NY Court of Appeals has noted that this approach differs from the standard set forth in Strickland. See, e.g., *Henry II, 95 N.Y.2d at 566, 721 N.Y.S.2d at 579* ("this Court has previously recognized the differences between the Federal and State tests for ineffectiveness, and has consistently adhered to the application of our 'meaningful representation' test"); *Benevento, 91 N.Y.2d at 713, 674 N.Y.S.2d at 633* ("prior to Strickland, we had 'developed a somewhat different test for ineffective assistance of counsel under *article I, § 6 of the New York Constitution* from that employed by the Supreme Court in applying the *Sixth Amendment*' (*People v Claudio, 83 N.Y.2d 76, 79, 629 N.E.2d 384, 607 N.Y.S.2d 912).*"); *People v. Claudio, 83 N.Y.2d 76, 79, 629 N.E.2d 384, 607 N.Y.S.2d 912, 914 (1993)* (same) ("compar[ing] *People v Baldi, 54 N.Y.2d 137, 147, 429 N.E.2d 400, 444 N.Y.S.2d 893, . . .* with *Strickland v Washington, 466 US 668, 687, 80 L. Ed. 2d 674, 104 S. Ct. 2052*)").

The acknowledged difference between the Strickland and the New York standards is that, under Strickland, when counsel's performance has been judged unreasonably deficient,

an ineffective assistance claim is established if the court concludes that "but for counsel's unprofessional errors, there is a 'reasonable probability' that the outcome of the proceedings would have been different," *Henry II, 95 N.Y.2d at 566* n.*, *721 N.Y.S.2d at 579* n.* (quoting *Strickland, 466 U.S. at 687, 694)*, whereas the New York standard's "prejudice component . . . focuses on the 'fairness of the process as a whole rather than [any] particular impact on the outcome of the case' (*People v Benevento, supra, 91 NY2d, at 714*)," *Henry II, 95 N.Y.2d at 566, 721 N.Y.S.2d at 579* (brackets in Henry II) (emphasis ours).

In Benevento, the NY Court of Appeals stated that while its flexible

> inquiry focuses on the quality of the representation provided to the accused, the claim of ineffectiveness is ultimately concerned with the fairness of the process as a whole rather than its particular impact on the outcome of the case. . . . Thus, whether defendant would have been acquitted of the charges but for counsel's errors is relevant, but not dispositive under the State constitutional guarantee of effective assistance of counsel.

Benevento, 91 N.Y.2d at 714, 674 N.Y.S.2d at 633 (emphasis added). Thus, "whereas both tests contain a prejudice component, the touchstone of the New York test is 'the fairness of the process as a whole,' Benevento, [*91 N.Y.2d at 714*,] *674 N.Y.S.2d [at 633]*, while the federal test considers the outcome of the proceeding for the defendant, *Strickland, 466 U.S. at 694 . . . ." Eze, 321 F.3d at 123.*

Notwithstanding that difference, this Court has ruled on at least three occasions that the New York standard as articulated in Baldi (i.e., "so long as the evidence, the law, and the circumstances of a particular case, viewed in totality and as of the time of the representation, reveal that the attorney provided meaningful representation, the constitutional requirement will have been met," *54 N.Y.2d at 147, 444 N.Y.S.2d at 898*) is not "contrary to" the Strickland standard for purposes of *§ 2254(d)(1)*. See *Lindstadt, 239 F.3d at 198* ("standard applied by the state court is not diametrically different, opposite in character or nature, or mutually opposed to the standard articulated in Strickland" (discussing Baldi) (internal quotation marks omitted)); *Loliscio v. Goord, 263 F.3d at 193* (same) (discussing a NY Court of Appeals case quoting Baldi); *Eze, 321 F.3d at 122-24* (same) (discussing Baldi, Benevento, and Henry II).

In *Eze, 321 F.3d at 124*, we noted that, in the absence of a contrary decision by this Court en banc, or an intervening Supreme Court decision, we are bound to follow the precedents set in Lindstadt and Loliscio v. Goord that the NY Court of Appeals standard is not "contrary to" Strickland. Although, plainly, we are so bound, and although we thus premise our determination in the present case on the "unreasonable application" clause of *§ 2254(d)(1)*, we pause to question whether the New York standard is not contrary to Strickland within the framework set forth in *Williams*. A conclusion that the two standards are not diametrically different, opposite in character or nature, or mutually exclusive is standard in broad terms. Taking an overview, the New York principle, i.e., that a defendant must have meaningful representation sufficient to ensure that the process as a whole is fair, surely is not diametrically different from, opposed to, or inconsistent with the Strickland standard, which, in broad terms requires professionally competent assistance or at least assistance that

(albeit incompetent) does not render the result of the proceeding unreliable, and hence make the proceeding itself unfair.

We are hardly sure, however, that comparison at that level of generality is appropriate. In Williams, the Supreme Court stated as follows:

> A state-court decision will certainly be contrary to our clearly established precedent if the state court applies a rule that contradicts the governing law set forth in our cases. Take, for example, our decision in *Strickland v. Washington, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984).* If a state court were to reject a prisoner's claim of ineffective assistance of counsel on the grounds that the prisoner had not established by a preponderance of the evidence that the result of his criminal proceeding would have been different, that decision would be "diametrically different," "opposite in character or nature," and "mutually opposed" to our clearly established precedent because we held in Strickland that the prisoner need only demonstrate a "reasonable probability that . . . the result of the proceeding would have been different." *Id., at 694. . . . [In this]* scenario[], a federal court will be unconstrained by *§ 2254(d)(1)* because the state-court decision falls within that provision's "contrary to" clause.

Williams, 529 U.S. at 405-06 (emphases added). Plainly the quantum of proof established by Strickland as necessary to uphold the prejudice prong is but one part of the Strickland standard. Williams this indicates that in order to be "contrary to" the federal standard, a state-law principle need not be diametrically different from, or opposite in character to, or

mutually opposed to, the federal standard in toto. Rather, in the example given by Williams, if the state court's rejection of a claim is grounded on part of a state-law principle that is inconsistent with part of the Strickland standard, it meets the AEDPA "contrary to" test. Thus, in light of the Strickland principle that an ineffective assistance claim is established if the court concludes that there is a reasonable probability that but for counsel's professionally deficient performance the outcome of the proceeding would have been different, we find it difficult to view so much of the New York rule as holds that "whether defendant would have been acquitted of the charges but for counsel's errors is . . . not dispositive," *Benevento, 91 N.Y.2d at 714, 674 N.Y.S.2d at 633* (emphasis added), as not "contrary to" the prejudice standard established by Strickland.

Nonetheless, in the present case we need not make a determination under the "contrary to" clause, for we conclude that the Henry II Court's rejection of Henry's ineffective-assistance-of-counsel claim was at least an objectively unreasonable application of Strickland. The NY Court of Appeals clearly identified the federal standard, correctly stating the two-pronged Strickland test, see *Henry II, 95 N.Y.2d at 566* n.**, *721 N.Y.S.2d at 579* n.*, but, noting the difference between the Strickland test and the New York test, did not, in our view, reasonably apply either prong of *Strickland*.

As discussed in Part II.A. above, we have concluded that counsel's presentation of and continued emphasis on Person's alibi testimony for the wrong date--evincing a persistent inability to focus on the difference between the beginning and the end of the day--fell well below the required level of professional competence. And given the fact that Person's testimony that Henry was with her on Thursday night had no probative value to establish Henry's innocence of a crime that undisputedly had occurred 24 hours earlier, and that

the presentation of a false alibi can be taken as evidence of consciousness of guilt, counsel's insistence on presenting and adhering to the non-alibi alibi cannot objectively reasonably be deemed merely a matter of strategy rather than unprofessional error. The fact that the NY Court of Appeals deemed Watts's presentation of the false alibi defense to be a "tactic" does not alter our view; as Williams instructs, see Part II.B. above, a decision may constitute an objectively unreasonable application of federal law even if, as to the reasonableness of application, some reasonable jurists would reach a contrary conclusion. See *529 U.S. at 409*; see also *Loliscio v. Goord, 263 F.3d at 195* ("We find . . . that trial counsel's performance was objectively unreasonable, and thus that the state court's determination to the contrary constituted an unreasonable application of the first prong of Strickland.")

We conclude as well that the NY Court of Appeals's decision that Henry had not made a sufficient showing of prejudice resulting from counsel's presentation of the false alibi defense constituted an objectively unreasonable application of Strickland's test for prejudice. The Henry II Court's view that "counsel's presentation of the alibi testimony did not diminish the legitimacy of defendant's misidentification defense," *95 N.Y.2d at 566, 721 N.Y.S.2d at 579* (emphasis added), does not reasonably apply Strickland because it does not appear to consider the false alibi defense's likely effect on the jury. The very promise of an alibi, to support the defense of misidentification, had the jurors, in the words of the ADA, "up on the edge of their seat[s]" (Tr. 349). When Person's testimony proved to provide only a phony alibi, it enabled the ADA not only to emphasize repeatedly that it was for the wrong date, but also to argue that Person's alibi testimony was a "story" that she and Henry had carefully contrived to avoid both the need for corroboration and the possibility of contradiction (Tr. 355 ("It is very easy to say we were supposed to do something, we

stayed home. That's why they went with that story.")). As it is "axiomatic," *United States v. Parness, 503 F.2d at 438*, that the presentation of false exculpatory evidence in general, and false alibi evidence in particular, is likely to be viewed by the jury as evincing consciousness of guilt, the false alibi defense here, while not diminishing the "legitimacy" of the misidentification defense, may well have diminished its effectiveness. And the Henry II Court's reliance on "counsel's competency in all other respects," *95 N.Y.2d at 566, 721 N.Y.S.2d at 579*, failed to apply the Strickland standard at all.

Accordingly, we conclude that the state court's rejection of Henry's federal ineffective-assistance-of-counsel claim is not entitled to AEDPA deference, and that his petition for a writ of habeas corpus should be granted.

Ordinarily, when we have found potential merit in a claim that counsel has provided constitutionally ineffective assistance, we do not order the granting of habeas corpus without offering counsel "'an opportunity to present evidence, in the form of live testimony, affidavits, or briefs.'" *Cox v. Donnelly, 387 F.3d 193, 201 (2d Cir. 2004)* (quoting *Bloomer v. United States, 162 F.3d 187, 194 (2d Cir. 1998)*). In the present matter, however, the record already contains Watts's explanations for his presentation of the alibi defense, to wit, his affidavit in Henry's *§ 440.10* proceeding. Accordingly, we conclude here that no further hearing is necessary.

CONCLUSION

For the reasons stated above, we reverse the judgment of the district court and remand for the entry of a judgment that conditionally grants the writ, ordering the State to release Henry unless it provides him with a new trial within 90 days of the date of this decision.

CONCUR BY: SACK

CONCUR: SACK, Circuit Judge, concurring

I fully concur in the thorough and thoughtful opinion of Judge Kearse. I pause to note that it expresses doubt about our previously stated view that the New York Court of Appeals rule as to ineffective assistance of counsel, see, e.g., *People v. Benevento, 91 N.Y.2d 708, 697 N.E.2d 584, 674 N.Y.S.2d 629 (1998)*, is not "contrary to" federal law clearly established by the Supreme Court in *Strickland v. Washington, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984)*. The opinion cites (and therefore casts doubt upon the conclusion in) three of our decisions: *Lindstadt v. Keane, 239 F.3d 191, 198 (2d Cir. 2001)* ("The standard applied by the state court is not diametrically different, opposite in character or nature, or mutually opposed to the standard articulated in Strickland.") (citation and internal quotation marks omitted); *Loliscio v. Goord, 263 F.3d 178, 193 (2d Cir. 2001)* (same, citing *Lindstadt*); *Eze v. Senkowski, 321 F.3d 110, 123-24 (2d Cir. 2003)* (same, citing Lindstadt and Loliscio, but noting in that connection, as Judge Kearse does here,"that we are compelled to follow the decisions of earlier panels unless they have been called into question by an intervening Supreme Court decision or by one of this Court sitting in banc") (citation and internal quotation marks omitted).

Because I concurred in Lindstadt, I write separately to note that I nonetheless find considerable merit in Judge Kearse's criticism of the rule. Our decision here does not turn on its correctness. If and when we are required to decide an appeal that does, assuming that the Supreme Court does not give us guidance in the interim, we might be well advised to consider the appeal for en banc review as a means to reconsider the issue. Cf. *Landell v. Sorrell, 406 F.3d 159, 2005 U.S. App. LEXIS 8256 (2d Cir 2005)* (Sack, J. and Katzmann, J., concurring in denial of rehearing en banc).

Date:	10/21/05
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Docket Number:	03-2884-pr
Short Title:	Henry v. Poole
DC Docket Number:	02-cv-2949
DC:	EDNY (BROOKLYN)
DC Judge:	Honorable Jack Weinstein

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, Foley Square, in the City of New York, on the ___ day of ___ two thousand five.

Present:

Hon. James L. Oakes,
Hon. Amalya L. Kearse,
Hon. Robert D. Sack,

CIRCUIT JUDGES,

DWAYNE HENRY,

Petitioner-Appellant,

v.

THOMAS POOLE, Superintendent
Five Points Correctional Facility and
ELIOT L. SPITZER, Attorney General of New York,

Respondents-Appellees.

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by Donna Aldea, counsel for

appellees. Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED.**

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active serve and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

For the Court,

Roseann B. MacKechnie, Clerk

By: _____
Motion Staff Attorney

(2)

Supreme Court, U.S.
FILED

05-943 JAN 19 2006

OFFICE OF THE CLERK

No. 05-

IN THE

Supreme Court of the United States

THOMAS POOLE, Superintendent
FIVE POINTS CORRECTIONAL FACILITY and
ELIOT L. SPITZER, Attorney General of New York,

Petitioners,

v.

DWAYNE HENRY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUPPLEMENTAL APPENDIX

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January 25, 2006

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------x

DWAYNE HENRY,

Petitioner,

-against-

THOMAS POOLE,
Superintendent of
Five Points Correctional Facility,

Respondent.

MEMORANDUM, JUDGMENT & ORDER

02-CV-2949 (JBW)
03-MISC-0066

----------x

JACK B. WEINSTEIN, Senior District Judge:

The petition for a writ of habeas corpus is denied. No hearing on this matter is necessary. This memorandum briefly addresses petitioner's claims.

I. Facts and Procedural History

Petitioner (sometimes referred to as defendant) filed this petition on May 16, 2002. His claims (according to the memorandum submitted on his behalf by the Legal Aid Society) are as follows:

> Whether petitioner was denied the effective assistance of counsel where his trial lawyer promised an alibi defense, proceeded to elicit an alibi for the night after the crime, and continued to press this fallacious defense on the jury even

> after the prosecution had exposed its irrelevance, thereby fatally undermining what was otherwise a potentially powerful misidentification defense, and where the prosecution capitalized on these errors by ridiculing counsel's reliance on the fallacious alibi, arguing that the alibi witness had lied to the jury and suggesting she was so unreliable that she could not even concoct an alibi for the correct night.

The facts according to the Legal Aid are as follows:

At around 12:10 a.m., on the morning of Thursday, August 10, 1995, five men robbed Richard Mitchell, a driver for Big Dee's Car Service in Jamaica, Queens. Two of the perpetrators were passengers whom Mitchell had picked up in his cab. The others came on the scene during the robbery. Mitchell described the front-seat passenger from his cab that night as a dark skinned black man, 20 to 22 years old, 5'9" tall, 160-165 pounds, with a gold tooth. Some three weeks later, petitioner was arrested on an unrelated case. Petitioner was 18 years old, black, 5'9", 160 pounds, with a tattoo on his chest. The police placed petitioner in a line-up and Mitchell picked him as the front-seat passenger from the cab. There is no indication in the record that petitioner had a gold tooth at the lineup. The grand jury heard testimony from defendant's then girlfriend Lakeesha Person, who gave an alibi for the night of Thursday, August 10. It indicted petitioner for robbing Mitchell.

During jury selection, the State disclosed the minutes of Person's grand jury testimony to petitioner's trial counsel. In his opening statement petitioner's counsel informed the jury that Person would testify as an alibi witness and that the case

was, in essence, a credibility contest. The People's proof was simply Mitchell's identification testimony, including the same generic description of the front-seat passenger that Mitchell originally provided to the police. Although the stolen car had been recovered, no physical evidence connected petitioner to the crime. Petitioner's counsel called Person. On direct examination, Person testified that at around 12 o'clock on the night of August 10, 1995, she and appellant were together at her house. They had stayed in because they were unable to get a babysitter. She also testified that she had never known petitioner to wear a gold tooth. On cross-examination, however, Person immediately acknowledged that at trial, just as in her testimony to the grand jury, she was speaking about petitioner's whereabouts on the afternoon and evening of Thursday, August 10 into Friday, August 11, 1995, and had never provided an alibi for any other time. Since the robbery occurred in the early morning hours of Thursday, August 10, the purported alibi applied to the night after the crime.

Notwithstanding the evident irrelevance of the alibi testimony, trial counsel continued to press the defense. On summation, he persisted with the argument that Person had alibied defendant for the night of the crime and that the case came down to the question of the credibility of the alibi. The prosecutor capitalized on counsel's reliance on this fallacious defense as follows:

> Now the defense, of course, calls an alibi witness. And everybody is up on the edge of their seat. This is a big thing. This is where he says he was . . . I submit to you, you ignore everything she said, because it is absolutely irrelevant . . . . [H]e is not charged with committing a crime Thursday into Friday. He is accused of committing a crime Wednesday into

> Thursday morning. So her testimony, I submit, should just be disregarded.

He argued that the alibi was fabricated and suggested that the fact that Person had testified about the wrong day was evidence of the fabrication. The jury convicted petitioner of first and second- degree robbery and the court imposed concurrent sentences of 10 to 20 and 6 to 12 years respectively.

Petitioner appealed to the Appellate Division, Second Department, claiming that his trial counsel's presentation of the irrelevant alibi defense devastated a potentially powerful mis-identification defense, depriving petitioner of his state and federal constitutional rights to effective assistance of counsel (Petitioner's Appendix, A 3-18). Petitioner argued that, based on the prosecutor's pre-trial disclosures and the trial evidence, trial counsel had "actual knowledge before trial that defendant's alibi witness could not vouch for appellant's whereabouts at the time of the robbery" (A 8). He also argued that, even without "actual knowledge" that the alibi was irrelevant, counsel had sufficient information to determine that the alibi was irrelevant and would be ineffective for failing adequately to investigate and prepare the defense (A 8, n. 10). In support of these arguments, defense counsel relied, inter alia, on the Appellate Division's decisions in *People v. Long*, 81 A.D.2d 521 (1st Dept. 1981) and *People v. Cabarera*, 234 A.D.2d 557, 558 (2d Dept. 1996), both cases in which trial counsel, notwithstanding an otherwise effective performance, was found ineffective for questioning a purported alibi witness in a manner that elicited testimony for the wrong date or time (A 5-8). Petitioner noted that no reasonable strategic consideration could have motivated counsel's reliance on the irrelevant "alibi" (A 11), and argued, stressing the weakness of the People's case, that he had been prejudiced under both state and federal constitutional standards (A 14-17).

In response, the State contended that in light of the "totality of the circumstances" trial counsel provided "a meaningful defense" (A 19). The State based this conclusion on the fact that trial counsel had successfully moved for a Wade hearing, had objected to the admissibility of petitioner's prior convictions and other prior acts in the event that petitioner should testify, had competently selected a jury, had given "an effective opening statement" presenting a mis-identification defense "in addition to the alibi defense," had adequately argued that defense to the jury, and had been competent at sentencing (A 19-23). The State also argued that the irrelevant alibi testimony had not prejudiced petitioner because Person was not a credible witness, the People had provided "compelling proof" of identity that was considered by the jury, and because Person's testimony about defendant's lack of a gold tooth supported the mis-identification defense (A 25-29).

On November 29, 1999, the Appellate Division reversed the judgment and ordered a new trial (A 1-2). Reported at 266 A.D.2d 564, 699 N.Y.S.2d 129 (1999). The court specifically noted that "defense counsel's questions to the witness focused on the night of August 10, 1995, resulting in testimony concerning the defendant's whereabouts almost 24 hours after the crime had been committed" (A 1). It reasoned, accordingly, that "inasmuch as the witness's testimony went to the heart of the alibi, counsel's error undermined the defense" and held that "notwithstanding counsel's competency in other aspects of the proceedings, the representation provided was not adequate or effective in any meaningful sense of the words" (A 1). One justice concurred, "on constraint of *People v. Cabrera*" (A 2).

State's Appeal to the New York Court of Appeals

The State sought and obtained leave to appeal to the New York Court of Appeals from the concurring Appellate

Division justice. In its brief, the State argued that the trial counsel had made an "informed decision" to present an irrelevant alibi as a "trial gambit, founded on the hope that the prosecutor would not realize that this testimony actually related to the night after the crime" (A 36, 37). As in the Appellate Division, the State also stressed counsel's effective representation of petitioner pre-trial and at sentencing, in his opening statement, in objections that he raised during the trial, and in his presentation of a mis-identification defense at trial and on summation (A 38-40). In support of its argument that the presentation of the irrelevant alibi was a reasonable trial strategy and one that had not prejudiced petitioner, the People contended that "the actual result of counsel's action was, at worst, equivalent to presenting no alibi at all" (A 37, 41).

Petitioner responded that there was no basis in the record to conclude that the presentation of the alibi was anything other than a mistake due to lack of preparation (A 50). In any event, no reasonable or legitimate strategy could justify counsel's reliance, from opening statements through summation, on an alibi that, as the prosecution had conclusively demonstrated, was fallacious (A 50-52). Petitioner argued that the State's contention that he could not have been prejudiced by counsel's presentation of the irrelevent defense, since the jury would simply ignore the irrelevent alibi evidence, was ridiculous and was unsupported by any law (A 52). In addition to the Appellate Division cases referenced above petitioner relied on *United States ex rel. Connor v. Lane*, 81 C 2527 (N.D. Ill 1983), in which the District Court held that the presentation of an alibi for the wrong night, in a single eyewitness identification case "utterly destroyed the credibility of petitioner's defense" and "undercut" counsel's "entire position that there was a reasonable doubt as to the identify of the [defendant] by the victim" (A 44-45). A copy of the

unpublished opinion is included in Petitioner's Appendix at pp. 72-82.

By order dated December 21, 2000, the Court of Appeals reversed the order of the Appellate Division (A 30-35). Reported at 94 N.Y.2d 927, 708 N.Y.S.2d 367 (2000). The New York Court of Appeals order remitted the case for consideration of the "facts and issues raised but not determined on appeal to that court" (A 34). On March 12, 2001, the Appellate Division affirmed the judgment. *See People v. Henry*, 281 A.D.2d 490, 721 N.Y.S.2d 793 (2001). After discussion of New York's "meaningful representation" standard for ineffective assistance and its relation to the Federal standard, the court applied the New York standard in the following terms:

> [W]e concluded that [petitioner] received meaningful representation. Although the prosecution discredited the alibi testimony, this also did not "seriously compromise" defendant's right to a fair trial (*see People v. Hobot*, 94 N.Y.2d 1021, 1022). Counsel competently represented defendant's interests at other stages of the proceedings, an counsel's presentation of the alibi testimony did not diminish the legitimacy of defendant's misidentification defense. Indeed, the thrust of the defense was misidentification, which was, in part, buttressed by the alibi witness's testimony. Counsel further supported that defense by vigorously attacking the reliability of the victim's identification and highlighting the discrepancies in the victim's description of the defendant. In view of the extensive misidentification defense and counsel's

> competency in all other respects, we conclude that the failed attempt to establish an alibi was at most an unsuccessful tactic that cannot be characterized as ineffective assistance (*see People v. Jackson*, 52 N.Y.2d 1027, 1029).

(A 34).

Petitioner returned to state trial court to address the State's contention that the presentation of the irrelevant alibi was a deliberate tactic. On March 11, 2002, petitioner filed a motion pursuant to New York Criminal Procedure Law section 440.10(1)(h), to vacate the judgment on grounds of ineffective assistance of counsel. In support of the motion, petitioner submitted the affirmance of defendant's trial counsel Patrick Watts, in which he responded to the State's contentions that he had knowingly introduced an irrelevant alibi as follows:

> In over twenty years of practice as a prosecutor and defense lawyer I have never employed those or any similar trial tactics. To have called Ms. Person in a deliberate attempt to persuade the jury to adopt an irrelevant alibi would, I believe, have been unethical. In addition, I do not accept that it could ever made strategic sense to jeopardize a strong case by knowingly presenting an irrelevant alibi to a jury.
>
> My reason for calling Ms. Person as an alibi witness in this case was my belief that she knew Mr. Henry's whereabouts at the time of the crime. From her trial testimony it now appears that Ms. Person was confused either about the night on which she and Mr. Henry had planned to go to the movies or about the night on which

> the crime was alleged to have occurred. In either case, it was an honest mistake. If I had believed that Ms. Person was unable to account for Mr. Henry's whereabouts at the time of the crime, I would not have called her as an alibi witness.

(A 56-57).

Petitioner argued that, given the Court of Appeals characterization of the irrelevant alibi, "on this record" as "at most an unsuccessful tactic," the expanded record called for a fresh determination of the merits of his ineffectiveness claim.

The State responded, *inter alia*, that petitioner's motion was procedurally barred because the issues raised were either decided on the merits on direct appeal or could have been raised on the record of direct appeal and had not been raised (A 61-63). The State characterized the decision of the New York Court of Appeals as turning on the court's conclusion that petitioner was not prejudiced by the presentation of the irrelevant alibi (A 63-65 n. 5). It emphasized that there was "no evidence that the Court of Appeals adopted" the State's argument that counsel's presentation of the fallacious alibi was a deliberate and reasonable trial tactic and that the Court of Appeals has determined that the "tactic" was unreasonable and a mistake (A 65, n.5).

Petitioner also served the State with a subpoena for the minutes of Person's grand jury testimony. The State had voluntarily disclosed those minutes to trial counsel days before counsel's opening statement. The People moved to quash the subpoena.

On March 26, 2002, the court denied petitioner's motion to vacate the judgment. It stated that the opinion of the Court of Appeals "was most clear on the issue of meaningful representation," quoted the Court of Appeals opinion, and held that "[a]ccordingly, the motion is procedurally barred pursuant to C.P.L. [§ 420.10(2)(a)], as the issue raised herein was previously determined upon the appeal, without there having been any retroactive change in the law since that time" (A 69-70). Following denial of the motion, the court granted People's motion to quash the subpoena. In light of the court's simultaneous denials of the motion to vacate and grant of the motion to quash, petitioner sought and obtained the court's permission to submit a supplemental affirmation stating that, in an off-the-record conversation, the District Attorney had admitted to petitioner's counsel that, in the grand jury, Person testified expressly that her account of defendant's whereabouts applied to Thursday into Friday night, August 10, 1995 (A 58-60). The court added the affirmation to the record but ruled that its contents were irrelevant since the case had been decided by the Court of Appeals. *See* Minutes, March 26, 2002, Supreme Court.

On April 5, 2002, petitioner filed a motion for leave to appeal the denial of the motion to vacate judgment with the Appellate Division, Second Department. On May 10, 2002, Associate Justice Stephen G. Crane, denied the motion for leave to appeal (A 71).

II. AEDPA

Under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), a federal court may grant a writ of habeas corpus to a state prisoner on a claim that was "adjudicated on the merits" in state court only if it concludes that the adjudication of the claim "(1) resulted in a decision that

was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d).

An "adjudication on the merits" is a "substantive, rather than a procedural, resolution of a federal claim." *Sellan v. Kuhlman*, 261 F.3d 303, 313(2d Cir. 2001) (quoting *Aycox v. Lytle*, 196 F.3d 1174, 1178 (10th Cir. 1999)). Under the "contrary to" clause, "a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by [the Supreme Court] on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts." *Williams v. Taylor*, 529 U.S. 362, 412-13 (2000) (O'Connor, J., concurring and writing for the majority in this part). Under the "unreasonable application" clause, "a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id.* at 413. Under this standard, "a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." *Id.* at 411. In order to grant the writ there must be "some increment of incorrectness beyond error," although the increment need not be great; otherwise, habeas relief would be limited to state court decisions so far off the mark as to suggest judicial incompetence." *Francis S. v. Stone*, 221 F.3d 100, 111 (2d Cir. 2000) (internal quotation marks omitted).

"[F]ederal law, as determined by the Supreme Court, may as much be a generalized standard that must be followed, as a bright-line rule designed to effectuate such a standard in a particular context." *Overton v. Newton*, 295 F.3d 270, 278 (2d Cir. 2002); *see also Yung v. Walker*, No. 01-2299, 2002 U.S. App. LEXIS 28137 (2d Cir. Aug. 1, 2003) (amended opinion) (district court's habeas decision that relied on precedent from the court of appeals is remanded for reconsideration in light of "the more general teachings" of Supreme Court decisions). The Court of Appeals for the Second Circuit has also indicated that habeas relief may be granted if a state court's decision was contrary to or an unreasonable application of "a reasonable extension" of Supreme Court jurisprudence. *Berbary v. Torres*, No. 02-2463, 2003 U.S. App. LEXIS 16167, at *25 (2d Cir. Aug. 7, 2003). Determination of factual issues made by a state court "shall be presumed to be correct," and the applicant "shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1).

III. Limitations Period

Congress has set a one-year period of limitations for the filing of an application for a writ of habeas corpus by a person in custody pursuant to a state court judgment. *See* 28 U.S.C. § 2244(d)(1). This limitations period ordinarily begins to run on "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." *Id.* § 2244(d)(1)(A). A conviction becomes final for habeas purposes when the ninety-day period for filing a petition for a writ of certiorari to the United States Supreme Court has expired. *See McKinney v. Artuz*, No. 01-2739, 2003 U.S. App. LEXIS 6745, at *22 (2d Cir. 2003); *see also* Sup. Ct. R. 13.

Prisoners whose convictions became final before the effective date of AEDPA, April 24, 1996, had a grace period of

one year, until April 24, 1997, to file their habeas application. *See Ross v. Artuz*, 150 F.3d 97, 103 (2d Cir. 1998).

"[T]he district court has the authority to raise a petitioner's apparent failure to comply with the AEDPA statute of limitation on its own motion." *Acosta v. Artuz*, 221 F.3d 117, 121 (2d Cir. 2000). "If the court chooses to raise sua sponte the affirmative defense of failure to comply with the AEDPA statute of limitation, however, the court must provide the petitioner with notice and an opportunity to be heard before dismissing on such ground." *Id.*

In calculating the one-year limitation period, the "time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted . . . ." 28 U.S.C. § 2244(d)(2). The "filing of creative, unrecognized motions for leave to appeal" does not toll the statute of limitations. *Adeline v. Stinson*, 206 F.3d 249, 253 (2d Cir. 2000); *see also Artuz v. Bennett*, 531 U.S. 4, 8 (2000) ("[A]n application is '*properly* filed' when its delivery and acceptance are in compliance with the applicable laws and rules governing filings. These usually prescribe, for example, the form of the document, the time limits upon its delivery, the court and office in which it must be lodged, and the requisite filing fee . . . . The question whether an application has been 'properly filed' is quite separate from the question whether the claims contained in the application are meritorious and free of procedural bar." (emphasis in original; footnote omitted)).

The term "pending" in the statute has been construed broadly to encompass all the time during which a state prisoner attempts, through proper use of state procedures, to exhaust state court remedies with regard to a particular post-conviction application. *See Bennett v. Artuz*, 199 F.3d 116, 120 (2d Cir.

1999), *aff'd*, 531 U.S. 4 (2000). "[A] state-court petition is 'pending' from the time it is first filed until finally disposed of and further appellate review is unavailable under the particular state's procedures." *Bennett*, 199 F.3d at 120; *Carey v. Saffold*, 536 U.S. 214 (2002) (holding that the term "pending" includes the intervals between a lower court decision and a filing in a higher court for motions for collateral review). A motion for extension of time to file an appeal does not toll AEDPA's limitations period unless an extension is actually granted. *See Bertha v. Girdich*, 293 F.3d 577, 579 (2d Cir. 2002).

The period of limitations set forth in AEDPA ordinarily does not violate the Suspension Clause. *See Muniz v. United States*, 236 F.3d 122, 128 (2d Cir. 2001) ("[T]he Suspension Clause does not always require that a first federal petition be decided on the merits and not barred procedurally" (quotation omitted)); *Rodriguez v. Artuz*, 990 F. Supp. 275, 283 (S.D.N.Y. 1998) (AEDPA statute of limitations is not, "at least in general," an unconstitutional suspension of the writ).

A pro se litigant is accorded "some degree of latitude" in meeting filing requirements. *Brown v. Superintendent*, 1998 U.S. Dist. LEXIS 1936, No. 97 Civ. 3303, 1998 WL 75686, at *4 (S.D.N.Y. Feb. 23, 1998). But "[it] has long been recognized that ignorance does not excuse lack of compliance with the law." *Velasquez v. United States*, 4 F. Supp. 2d 331, 334-35 (S.D.N.Y. 1998) (holding that Bureau of Prison's failure to notify prisoners regarding AEDPA's time limitation did not warrant acceptance of untimely petition); *see also Brown*, 1998 WL 75686 at *4 ("self-serving statement that the litigant is ignorant of the law is not grounds for equitable tolling of a statute of limitations").

The Supreme Court held in *Duncan v. Walker* that "an application for federal habeas corpus review is not an

'application for State post-conviction or other collateral review' within the meaning of 28 U.S.C. § 2244(d)(2)," and that therefore the section does "not toll the limitation period during the pendency of [a petitioner's] first federal habeas petition." 533 U.S. 167, 181-82 (2001). *Duncan* reversed a case in this circuit which held to the contrary. *See Walker v. Artuz*, 208 F.3d 357, 361-62 (2000). Although the Supreme Court has now declared that AEDPA's one-year limitations period is not tolled during the pendency of a properly filed federal habeas petition, this statute of limitations is not jurisdictional and may be tolled equitably. *Smith v. McGinnis*, 208 F.3d 13, 17 (2d Cir. 2000). "Equitable tolling . . . is only appropriate in 'rare and exceptional circumstances.' To merit application of equitable tolling, the petitioner must demonstrate that he acted with 'reasonable diligence' during the period he wishes to have tolled, but that despite his efforts, extraordinary circumstances 'beyond his control' prevented successful filing during that time." *Smaldone v. Senkowski*, 273 F.3d 133, 138 (2d Cir. 2001).

Although state prisoners are not entitled to counsel as of right in either New York state collateral or federal habeas corpus proceedings, the Court of Appeals for the Second Circuit has stated that "any attorney's conduct, if it is sufficiently egregious, may constitute the sort of 'extraordinary circumstances' that would justify the application of equitable tolling to the one-year limitations period of AEDPA." *Baldayaque v. United States*, No. 02-2611, 2003 U.S. App. LEXIS 15063, at *17 (2d Cir. July 30, 2003); *compare Smaldone*, 273 F.3d at 138-39 (attorney calculation error does not justify equitable tolling).

Prisoners cannot circumvent the strict AEDPA limitations period by invoking the "relation back" doctrine by arguing that a new petition should be treated as having been

filed on the same day as a first petition. As the court of appeals has explained,

> If [the limitations period] were interpreted as Petitioner argues, the result would be impractical. A habeas petitioner could file a non-exhausted application in federal court within the limitations period and suffer a dismissal without prejudice. He could then wait decades to exhaust his state court remedies and could also wait decades after exhausting his state remedies before returning to federal court to "continue" his federal remedy, without running afoul of the statute of limitations.

Warren v. Garvin, 219 F.3d 111, 114 (2d Cir. 2000) (quoting *Graham v. Johnson*, 158 F.3d 762, 780 (5th Cir. 1999)).

IV. Exhaustion

In the past, a state petitioner's federal habeas petition had to be dismissed if the prisoner did not exhaust available state remedies as to any of his federal claims. *See Rose v. Lundy*, 455 U.S. 509, 522 (1989). "This exhaustion requirement is . . . grounded in principles of comity: in a federal system, the States should have the first opportunity to address and correct alleged violations of [a] state prisoner's federal rights." *Coleman v. Thompson*, 501 U.S. 722, 731 (1991). The exhaustion requirement requires the petitioner to have presented to the state court "both the factual and legal premises of the claim he asserts in federal court." *Daye v. Attorney General*, 696 F.2d 186, 191 (2d Cir. 1982) (en banc).

Pursuant to AEDPA, a district court may now, in its discretion, *deny* on the merits habeas petitions containing

unexhausted claims -- so-called "mixed petitions." *See* 28 U.S.C. § 2254(b)(2) ("An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the state."). In addition, the state may waive the exhaustion requirement, but a "State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement." *Id.* § 2254(b)(3); *see also Ramos v. Keane*, No. 98 CIV. 1604, 2000 U.S. Dist. LEXIS 101, at *10 (S.D.N.Y. 2000) (state's failure to raise exhaustion requirement does not waive the issue).

V. Procedural Bar

A federal habeas court may not review a state prisoner's federal claims if those claims were defaulted in state court pursuant to an independent and adequate state procedural rule, "unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice." *Coleman*, 501 U.S. at 750. In determining whether a procedural bar is sufficient to preclude habeas review, a federal court must consider as "guideposts" the following:

> (1) whether the alleged procedural violation was actually relied on in the trial court, and whether perfect compliance with the state rule would have changed the trial court's decision; (2) whether state case law indicated that compliance with the rule was demanded in the specific circumstances presented; and (3) whether petitioner had "substantially complied" with the rule given "the realities of trial," and, therefore,

> whether demanding perfect compliance with the rule would serve a legitimate governmental interest.

Cotto v. Herbert, 331 F.3d 217, 240 (2d Cir. 2003) (quoting *Lee v. Kemna*, 534 U.S. 362 (2002)).

If a state court holding contains a plain statement that a claim is procedurally barred then the federal habeas court may not review it, even if the state court also rejected the claim on the merits in the alternative. *See Harris v. Reed*, 489 U.S. 255, 264 n.10 (1989) ("a state court need not fear reaching the merits of a federal claim in an *alternative* holding" so long as it explicitly invokes a state procedural rule as a separate basis for its decision).

When a state court says that a claim is "not preserved for appellate review" and then rules "in any event" on the merits, such a claim is not preserved. *See Glenn v. Bartlett*, 98 F.3d 721, 724-25 (2d Cir. 1996). When a state court "uses language such as 'the defendant's remaining contentions are either unpreserved for appellate review or without merit,' the validity of the claim is preserved and is subject to federal review." *Fama v. Comm'r of Corr. Svcs.*, 235 F.3d 804, 810 (2d Cir. 2000). Where "a state court's ruling does not make clear whether a claim was rejected for procedural or substantive reasons and where the record does not otherwise preclude the possibility that the claim was denied on procedural grounds, AEDPA deference is not given, because we cannot say that the state court's decision was on the merits." *Su v. Filion*, No. 02-2683, 2003 U.S. App. LEXIS 13949 at *15 n.3 (2d Cir. July 11, 2003) (citing *Miranda v. Bennett*, 322 F.3d 171, 178 (2d Cir. 2003)). This congeries of holdings leaves it an open question whether there are "situations in which, because of uncertainty

as to what the state courts have held, no procedural bar exists and yet no AEDPA deference is required." *Id.*

VI. Actual Innocence

"[A] habeas petitioner may also bypass the independent and adequate state ground bar by demonstrating a constitutional violation that resulted in a fundamental miscarriage of justice, *i.e.*, that he is actually innocent of the crime for which he has been convicted." *Dunham v. Travis*, 313 F.3d 724, 729 (2d Cir. 2002).

Because habeas corpus "is, at its core, an equitable remedy," *Schlup v. Delo*, 513 U.S. 298, 319 (1995), the Supreme Court has stated that "in appropriate cases, the principles of comity and finality that inform the concepts of cause and prejudice must yield to the imperative of correcting a fundamentally unjust incarceration," *id.* at 320-21 (quotations omitted). To ensure that this exception remains rare and will be applied only in the extraordinary case, the Court has "explicitly tied" the miscarriage of justice exception to the petitioner's innocence. *Id.* at 321. "To be credible, such a claim requires petitioner to support his allegations of constitutional error with new reliable evidence . . . that was not presented at trial. Because such evidence is obviously unavailable in the vast majority of cases, claims of actual innocence are rarely successful." *Id.* at 324.

A showing of actual innocence serves merely as a gateway to the airing of the petitioner's defaulted claim and is not itself cognizable in habeas as a free-standing claim. *See Herrera v. Collins*, 506 U.S. 390, 400 (1993) ("[C]laims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the

underlying state criminal proceeding."). A habeas court is, in short, concerned "not [with] the petitioners' innocence or guilt but solely [with] the question whether their constitutional rights have been preserved.'" *Id.* (quoting *Moore v. Dempsey*, 261 U.S. 86, 87-88 (1923)); *cf. Jackson v. Virginia*, 443 U.S. 307 (1979) (habeas court may review an *independent constitutional claim* that the evidence adduced at trial was insufficient to convict a criminal defendant beyond a reasonable doubt); *Thompson v. Louisville*, 362 U.S. 199 (1960) (reversing conviction of "Shuffling Sam" *on direct review* from conviction in Louisville's police court where there was no evidence that defendant violated city ordinances).

VII. Ineffective Assistance of Counsel

The Counsel Clause of the Sixth Amendment provides that a criminal defendant "shall enjoy the right . . . to have the Assistance of Counsel for his defense." U.S. Const. amend. VI. This right to counsel is "the right to *effective* assistance of counsel." *McMann v. Richardson*, 397 U.S. 759, 771 n. 14 (1970) (emphasis added). The Supreme Court has explained that in giving meaning to this requirement we must be guided by its purpose -- "to ensure a fair trial" -- and that therefore the "benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686 (1984). In order to prevail on a Sixth Amendment claim, a petitioner must prove both that counsel's representation "fell below an objective standard of reasonableness" measured under "prevailing professional norms," *id.* at 688, and that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," *id.* at 694. *See also Wiggins v. Smith*, 539 U.S. __, No. 02-311, slip op. at 8-10

(June 26, 2003); *United States v. Eyman*, 313 F.3d 741, 743 (2d Cir. 2002). A "reasonable probability" is "a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.

The performance and prejudice prongs of *Strickland* may be addressed in either order, and "[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice . . . that course should be followed." *Id.* at 697. In evaluating the prejudice suffered by a petitioner as a result of counsel's deficient performance, the court looks to the "cumulative weight of error" in order to determine whether the prejudice "reache[s] the constitutional threshold." *Lindstadt v. Keane*, 239 F.3d 191, 202 (2d Cir. 2001). The court must also keep in mind that "a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support." *Strickland*, 466 U.S. at 696. "The result of a [criminal] proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome." *Purdy v. Zeldes*, No. 02-7468, 2003 U.S. App. LEXIS 2053, at *18 (2d Cir. Feb. 6, 2003) (quoting *Strickland*, 466 U.S. at 694). Ineffective assistance may be demonstrated where counsel performs competently in some respects but not in others. *See Eze v. Senkowski*, 321 F.3d 110, 112 (2d Cir. 2003).

As a general matter, strategic choices made by counsel after a thorough investigation of the facts and law are "virtually unchallengeable," though strategic choices "made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Strickland*, 466 U.S. at 690-91. Counsel, in other words, "has a duty to make reasonable investigations or to make a reasonable decision that makes particular

investigations unnecessary." *Id.* at 691. Where counsel fails to make a reasonable investigation that is reasonably necessary to the defense, a court must conclude that the decision not to call an expert cannot have been based on strategic considerations and will thus be subject to review under *Strickland's* prejudice prong. *See Pavel v. Hollins*, 261 F.3d 210, 223 (2d Cir. 2001) (counsel ineffective in a child sexual abuse case where his failure to call a medical expert was based on an insufficient investigation); *Lindstadt*, 239 F.3d at 201 (same). The court of appeals for the Second Circuit has recently gone so far as to imply that all of counsel's significant trial decisions must be justified by a sound strategy -- a significant raising of the bar that would appear to require an unrealistic degree of perfection in counsel. *See Eze*, 2003 U.S. App. LEXIS 2511, at *78 - *79 (remanding to district court for factual hearing because it was "unable to assess with confidence whether strategic considerations accounted for . . . counsel's decisions").

There is "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689.

Each factual claim made in support of an allegation of ineffective assistance of counsel must be fairly presented to a state court before a federal habeas court may rule upon it. *See Rodriguez v. Hoke*, 928 F.2d 534, 538 (2d Cir. 1991) (dismissing petition as unexhausted where petitioner's claim of ineffective assistance of counsel alleged more deficiencies before the habeas court than were presented to the state court, because "[t]he state courts should have been given the opportunity to consider all the circumstances and the cumulative effect of all the claims as a whole" (quotation omitted)). Where an additional factual claim in support of the ineffective-assistance allegation merely "supplements" the ineffectiveness claim and does not "fundamentally alter" it,

dismissal is not required. *Caballero v. Keane*, 42 F.3d 738, 741 (2d Cir. 1994). Each significant factual claim in support of an ineffective-assistance allegation promised on appellate counsel's deficient performance must be exhausted. *See Word v. Lord*, No. 00 CIV. 5510, 2002 U.S. Dist. LEXIS 19923, at *34 - *35 (S.D.N.Y. Mar. 18, 2005) (Magistrate's Report and Recommendation).

Although the *Strickland* test was formulated in the context of an ineffective assistance of trial counsel claim, the same test is used with respect to claims of ineffective appellate counsel. *See Claudio v. Scully*, 982 F.2d 798, 803 (2d Cir. 1992). Appellate counsel does not have a duty to advance every nonfrivolous argument that could be made, *see Jones v. Barnes*, 463 U.S. 745, 754 (1983), but a petitioner may establish that appellate counsel was constitutionally ineffective "if he shows that counsel omitted significant and obvious issues while pursuing issues that were clearly and significantly weaker," *Mayo v. Henderson*, 13 F.3d 528, 533 (2d Cir. 1994). Either a federal or a state law claim that was improperly omitted from an appeal may form the basis for an ineffective assistance of appellate counsel claim, "so long as the failure to raise the state . . . claim fell outside the wide range of professionally competent assistance." *Id.* (quotations omitted).

VIII. Errors of State Law

Federal habeas corpus relief does not lie for mere errors of state law. *Estelle v. McGuire*, 502 U.S. 62, 68 (1991). Nonetheless, the Due Process Clause requires that state courts conducting criminal trials "proceed consistently with 'that fundamental fairness' which is 'essential to the very concept of justice.'" *Dunnigan v. Keane*, 137 F.3d 117, 125 (2d Cir. 1998) (quoting *Lisenba v. California*, 314 U.S. 219, 236 (1941)). Errors of state law that rise to the level of a constitutional

violation may be corrected by a habeas court, but even an error of constitutional dimensions will merit habeas corpus relief only if it had a "'substantial and injurious effect or influence in determining the jury's verdict.'" *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993) (quotation omitted).

IX. Evidentiary Error

For a habeas petitioner to prevail on a claim that an evidentiary error amounted to a deprivation of due process, he must show that the error was so pervasive as to have denied him a fundamentally fair trial. *United States v. Agurs*, 427 U.S. 97, 108 (1976). The standard is "whether the erroneously admitted evidence, viewed objectively in light of the entire record before the jury, was sufficiently material to provide the basis for conviction or to remove a reasonable doubt that would have existed on the record without it. In short it must have been 'crucial, critical, highly significant.'" *Collins v. Scully*, 755 F.2d 16, 19 (2d Cir. 1985) (quoting *Nettles v. Wainwright*, 677 F.2d 410, 414-15 (5th Cir. 1982). This test applies post-AEDPA. *See Wade v. Mantello*, No. 02-2359, slip op. at 13 (2d Cir. June 13, 2003).

X. Verdict Against the Weight of the Evidence

To the degree petitioner claims that his guilt was not proven beyond a reasonable doubt, the relevant question for this court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). Petitioner "bears a very heavy burden" when challenging the legal sufficiency of the evidence in a state criminal conviction. *Einaugler v. Supreme Court*, 109 F.3d 836, 840 (2d Cir. 1997). To the degree petitioner claims the

verdict was against the weight of the evidence, such a claim does not present a federal constitutional issue.

XI. Legal Claims Frequently Raised in Habeas Corpus Applications.

For an explication of the law concerning other claims that are frequently raised before this court in applications for a writ of habeas corpus, *see Waters v. McGuiness*, 99-CV-0615, 03-MISC-0066 (JBW), 2003 U.S. Dist. LEXIS 11077, at *4 - *5 (E.D.N.Y. June 16, 2003) (grand jury claims); *Custodio v. Duncans*, Nos. 99-CV-2561, 03-MISC-00669 (JBW), 2003 U.S. Dist. LEXIS 11050, at *4-*7 (E.D.N.Y. June 11, 2003) (*Batson* challenges); *Reyes v. Irwin*, 99-CV-3758, 03-MISC-0066 (JBW), 2003 U.S. Dist. LEXIS 11045, at *5 -*6 (E.D.N.Y. June 20, 2003) (*Wade* claims); *Brathwaite v. Duncan*, 00-CV-0860, 03-MISC-0066 (JBW), 2003 U.S. Dist. LEXIS 11056, at *4-*5 (E.D.N.Y. June 10, 2003) (*Sandoval* claims); *Thomas v. Kuhlman*, 255 F.Supp.2d 99, 108-09 (E.D.N.Y. 2003) (perjured testimony); *Martinez v. Greiner*, 99-CV-4663, 03-MISC-0066 (JBW), 2003 U.S. Dist. LEXIS 11046, at *7 (E.D.N.Y. June 20, 2003) (Fourth Amendment claims); *Plunkett v. Keane*, 97-CV-1992, 03-MISC-0066 (JBW), 2003 U.S. Dist. LEXIS 11048, at *8-*9 (E.D.N.Y. June 10, 2003) (*Rosario* claims); *Beniquez v. Bennett*, 00-CV-0985, 03-MISC-0066 (JBW), 2003 U.S. Dist. LEXIS 11032, at *15-*16 (E.D.N.Y. June 16, 2003) (prosecutorial misconduct); *Sevencan v. Herbert*, No. 01-2491, slip op. at 6-13 (2d Cir. Aug. 7, 2003) (public trial); *Cox v. Donnelly*, 99-CV-8216, 03-MISC-0066 (JBW), 2003 U.S. Dist. LEXIS 9886, at *12-*14 (E.D.N.Y. June 12, 2003) (shifting burden of proof); *Jelinek v. Costello*, 247 F. Supp.2d 212, 266-67 (E.D.N.Y. 2003) (right to self-representation); *Stewart v. Senkowski*, 00-CV-0806, 03-MISC-0066 (JBW), 2003 U.S. Dist. LEXIS 11028, at *6 (E.D.N.Y. June 16, 2003) (erroneous jury instructions); *Jenkins*

v. Artuz, 98-CV-7837, 00-MISC-0066 (JBW), 2003 U.S. Dist. LEXIS 11049, at *7-*8 (E.D.N.Y. June 13, 2003) (abuse of discretion in sentencing).

XII. Harmless Error

In order to be entitled to habeas relief, a petitioner must ordinarily demonstrate that any constitutional error "had substantial and injurious effect or influence in determining the jury's verdict," and that the error resulted in "actual prejudice." *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993) (quotation marks omitted).

When a claim was never adjudicated on the merits in the state courts and there is no ruling which commands AEDPA deference, it is unclear what the standard for review for harmlessness should be in a collateral attack when a federal court finds constitutional error. Should it proceed under the "beyond a reasonable doubt" standard of *Chapman v. California*, 386 U.S. 18 (1967) (conviction infected by constitutional error must be overturned unless "harmless beyond a reasonable doubt") or under the "substantial and injurious effect or influence" standard of *Brecht* (for cases on collateral review, an error is generally considered harmless if it did not have a "substantial and injurious effect or influence in determining the jury's verdict")? The correct standard of review is an open question in this circuit. *See Cotto v. Herbert*, No. 01-2694, 2003 U.S. App. LEXIS 8326, at *92 (2d Cir. May 1, 2003).

XIII. Analysis of Claims

The New York State Court of Appeals' decision that petitioner received the effective assistance of counsel is entitled to deference. That Court adjudicated the merits of petitioner's

ineffective-assistance-of-counsel claim. That the Court of Appeals, unlike the Appellate Division, has only a limited power to decide issues of law rather than of fact does not affect the federal deference issue. *Compare* N.Y. Criminal Procedure Law section 470.20 ? section 470.35.

Under the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA), a state prisoner's habeas corpus petition "shall not be granted with respect to any claim that was adjudicated on the merits" in state court unless the state court's decision was "contrary to, or involved an unreasonable application of, clearly established" Supreme Court law. 28 U.S.C. § 2254(d)(1). This standard requires deference to state-court determinations on the law as well as the facts and is different from the previous de novo standard because even an incorrect determination must be upheld if it is reasonable. *Williams v. Taylor*, 529 U.S. 362, 410 (2000).

A state court adjudicates a federal claim on the merits when it disposes of the claim "on the merits," and reduces its disposition to judgment. *Sellan v. Kuhlman*, 261 F.3d 303, 309 (2d Cir. 2001). To determine whether a state court disposes of a claim on the merits, courts should consider (1) what the state courts have done in similar cases, (2) whether there was any indication that the state court was aware of any ground for not adjudicating the claim on the merits, and (3) whether the opinion suggests a reliance upon procedural grounds rather than a determination on the merits. *Sellan v. Kuhlman*, 261 F.3d at 314 (quoting *Mercadel v. Cain*, 179 F.3d 271, 274 [5th Cir. 1999]). When the state court does so, a federal habeas court must defer to the state court's decision in the manner prescribed in 28 U.S.C. § 2254(d)(1) even if the state court does not explicitly refer to the federal claim or to relevant federal case law. *Id; accord Bell v. Jarvis*, 236 F.3d 149 (4th Cir. 2000).

In *Williams v. Taylor*, the Supreme Court delineated an analytical framework for the new deferential standard of review, identifying the need to treat independently the "contrary to," and the "unreasonable application of," clauses of section 2254(d)(1). With respect to the "contrary clause," the Court held that the writ may issue in two circumstances: first, if the state-court decision applied the incorrect legal standard or rule to the case; and second, if the state-court decision addressed a set of facts "materially indistinguishable" from a relevant Supreme Court case and arrived at a result opposite to that reached by the Court. *Id.* at 404-406.

The Court recognized that the "contrary to" clause will not be implicated often. Instead, habeas review of the majority of state-court decisions will implicate the "unreasonable application" clause of section 2254(d)(1). A state court decision involves an unreasonable application of Supreme Court precedent when the state court either "identifies the correct governing legal rule from [the Supreme] Court's cases but unreasonably applies it to the facts" of the case or, "unreasonably extends a legal principle from [the Court's] precedent to a new context where is should not apply or unreasonably refuses to extend that principle to a new context where it should apply." *Id.* at 406-407.

An "unreasonable application" inquiry is limited. In this regard, the habeas court should ask only if the state court's application of Supreme Court precedent was "objectively unreasonable." The inquiry is not subjective, and is not dependent on a "reasonable jurists" test. *Id.* at 408-410. And significantly, "an unreasonable application of federal law is different from an incorrect application of federal law is different from an incorrect application of federal law." *Id.* at 410. A habeas court may no longer "issue the writ simply because that court concludes . . . that the relevant state-court decision

applied clearly established federal law erroneously or incorrectly." *Id.* The court may issue the writ only if the application of federal law was also unreasonable. *Id.*

Since *Williams v. Taylor*, the Court of Appeals for the Second Circuit has addressed the issue of what constitutes an "unreasonable application" of Supreme Court law in several cases. In determining whether a state-court decision is unreasonable, that Court has held that to be unreasonable, "[s]ome increment of incorrectness beyond error is required." *Francis S. v. Stone*, 221 F.3d 100, 111 (2d Cir. 2000).

As applied to ineffective assistance of counsel claims, AEDPA requires a petitioner to show that the state court applied *Strickland v. Washington*, 466 U.S. 668 (1984), to the facts of the case in an objectively unreasonable manner. "He must do more than show that he would have satisfied *Strickland's* test if his claim were being analyzed in the first instance." *Bell v. Cone*, __U.S.__, 122 S. Ct. 1843 (May 28 2002). Because the New York Court of Appeals adjudicated the merits of petitioner's ineffective-assistance-of-counsel claim, its decision is entitled to deference in this Court. Petitioner has not shown that the state court's decision was contrary to, or an unreasonable application of, established Supreme Court precedent.

The New York Court of Appeals' detailed decision rejecting petitioner's claim constitutes an adjudication on the merits for federal habeas purposes. It is entitled to section 2254's deferential standard of review.

Counsel is "strongly presumed" under *Strickland* to have rendered adequate assistance and to have made all significant decisions in the exercise of reasonable professional

judgment. 466 U.S. at 688; *United States v. Cronic*, 466 U.S. 648, 658 (1984).

In rejecting petitioner's claim, the Court relied on *People v. Baldi, supra*, that holds that "[s]o long as the evidence, the law, and the circumstances of a particular case, viewed in totality and as of the time of the representation, reveal that the attorney provided meaningful representation, the constitutional requirement will have been met." *People v. Baldi*, 54 N.Y.2d at 147, 444 N.Y.S.2d at 898. This standard is not contrary to *Strickland*. *See Loliscio v. Goord*, 263 F.3d 178 (2d Cir. 2001); *Lindstadt v. Keane*, 239 F.3d 191 (2d Cir. 2001).

Considering counsel's representation as a whole, the New York Court reasonably concluded that counsel provided petitioner with effective representation. In this regard, the record reveals that counsel zealously and effectively represented petitioner at every stage of the proceedings. Before trial, counsel moved to suppress the victim's identification testimony, extensively cross-examined the State's police witness, and argued that the line-up was unduly suggestive (Primerano: H 16-35). At trial, counsel strenuously objected to the prosecution's *Sandoval* and *Molineux* applications (Sandoval: 16-18), conducted a competent voir dire (Voir Dire: 95-96), and delivered an effective opening statement, in which he raised a strong misidentification defense and emphasized the prosecution's burden of proof (Opening: 163, 167). Throughout the course of the trial, counsel raised numerous objections to the prosecutor's questions and arguments, many of which were sustained. He also conducted extensive cross-examination of the State's witnesses, efficiently attacking the victim's credibility by eliciting testimony that he had a suspended license and a misdemeanor conviction (Mitchell: 173, 175).

Counsel presented four exhibits to support his misidentification defense, including the complaint report which revealed discrepancies between the victim's initial description of petitioner and his actual appearance, and the arrest photograph, which showed that although Mr. Mitchell had described petitioner as having short, wavy hair, petitioner had a full head of hair at the time of the arrest (Primerano: 264, 265-266; Summation: 319-20, 321). Counsel also republished the lineup photo to the jury, arguing that the lineup was suggestive because petitioner was taller than the five fillers (Primerano: 271, 324). Counsel presented a defense witness - Lakesha Person, not only to attempt to offer an alibi for petitioner, but also to support the misidentification defense. In this vein, counsel elicited that petitioner had a large tattoo on his chest, which had not been described by the victim (Person: 285). Counsel also elicited that in the four years that she had known petitioner, Person never saw him wear a gold tooth in his mouth -- a characteristic that the victim had mentioned in his description of the robber (Person: 285-86).

During his summation, counsel presented a cohesive summary of the evidence supporting the misidentification defense. He persuasively argued that Mr. Mitchell's description of the perpetrator did not match petitioner's appearance, and specifically highlighted the differences between Mitchell's description and petitioner's pedigree information (Summation: 328-29). He also referred to Person's testimony that petitioner did not have a gold tooth, and that he had a large tattoo on his chest, arguing that these factors also supported the conclusion that petitioner was not the perpetrator (Summation: 322-23). Counsel emphasized that the eyewitness neighbor who had called the police was never questioned, and did not testify at trial, thus implying that there was a gap in the State's evidence (Summation: 336).

Counsel also objected to portions of the court's charge and, after the verdict, argued for a lenient sentence, citing petitioner's youth and family background as mitigating factors (Sentencing: 7). Then, after the sentence was imposed, counsel requested that petitioner receive credit for the time he had already served (Sentencing: 11). Thus, viewed in its totality, the record demonstrates that counsel zealously, thoroughly, and effectively represented petitioner throughout the trial.

There is no reasonable possibility that, absent counsel's decision to elicit the alibi testimony, the outcome of petitioner's trial would have been different. *See Strickland v. Washington*, 466 U.S. at 694.

Although the case is not free from doubt, this claim does not warrant granting the writ.

XIV. Conclusion

Those claims not discussed in this memorandum are frivolous.

The petition for a writ of habeas corpus is denied.

A certificate of appealability is granted with respect to ineffective assistance of counsel, petitioner having made a substantial showing of the possible denial of a constitutional right. He may as already indicated, seek a further certificate of appealability from the Court of Appeals for the Second Circuit.

SO ORDERED

Jack B. Weinstein
Senior District Judge

Dated: October 8, 2003
Brooklyn, NY